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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 1159

SOUTHERN PACIFIC COMPANY, *et al.*,
*Appellants,*

—v.—

UNITED STATES OF AMERICA, *et al.*,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

## JURISDICTIONAL STATEMENT

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## JURISDICTIONAL STATEMENT

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Appellants Southern Pacific Company ("SP") and Union Pacific Railroad Company ("UP") appeal from a judgment of the United States District Court for the District of Nebraska, dismissing appellants' complaint which sought to set aside a supplemental order of the Interstate Commerce Commission. Appellants submit this statement to show that the Supreme Court has jurisdiction and that substantial questions are presented.

### Opinion Below

The opinion of the court below is not yet officially reported. The opinion and the dissenting opinion of Chief Judge Robinson are submitted herewith as Appendix A.

## Jurisdiction

This suit was brought under 28 U.S.C. §§1336. 2284 and 2321-25 to set aside the supplemental order of the Commission dated January 6, 1966. The judgment sought to be reviewed was dated December 5, 1967, and was entered December 6, 1967. The notice of appeal was filed in the court below on December 27, 1967. The jurisdiction of the Supreme Court is conferred by 28 U.S.C. §§1253 and 2101(b) and is sustained by *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962).

## Questions Presented

1. Did the court below err in finding that the Commission had reserved the power to modify conditions (a)-(e) in *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508 (1923)? (Pages 12 through 17 hereof.)

2. Did the court below err in sustaining the Commission's 1966 determination that condition (e) of its 1923 order (requiring SP, as successor to Central Pacific Railway Company ("CP"), to solicit traffic preferentially for UP) was contrary to the public interest and not just and reasonable as required by Section 5(2) of the Interstate Commerce Act, despite the Commission's determination, in 1962, on an identical record, that condition (e) continued to meet these criteria? (Pages 17 through 24 hereof.)

3. Did the court below err (i) in not construing the Pacific Railroad Acts (which provided for the construction of the first transcontinental railroad) as obligating CP and UP to prefer each other's line in the solicitation and routing of traffic, (ii) in not finding that the Commission in 1923 imposed the requirement in condition (e) that SP, as successor to CP, solicit preferentially for UP, for the

express purpose of carrying out the policy of the Pacific Railroad Acts and (iii) in finding that such reciprocal preferential solicitation and routing were in direct contravention of the Pacific Railroad Acts? (Pages 24 through 30 hereof.)

4. Did the court below err (i) finding that, if condition (e) were modified to eliminate SP preferential solicitation of UP, then the reciprocal preferential solicitation, provided for in the agreement of May 5, 1924 between SP and UP, was without legal legal authority, (ii) in sustaining the Commission's conclusion that the solicitation and routing provisions of said agreement should be set aside as violative of the National Transportation Policy, and (iii) in finding that such solicitation and routing provisions violated Section 3(4) of the Interstate Commerce Act? (Pages 30 through 35 hereof.)

5. Did the court below err in holding that since UP was not an applicant in the 1923 I.C.C. proceeding, the immunity afforded by Section 5(11) of the Interstate Commerce Act was not applicable to the preferential solicitation by UP of the CP line contemplated by condition (e)? (Footnote page 31 hereof.)

## Statement

This case had its genesis in *United States* v. *Southern Pacific Co.*, 259 U.S. 214 (1922) which held that control of CP by a predecessor of SP violated the antitrust laws.

The line of CP extends from San Francisco to Ogden where it connects with UP which extends eastward to Omaha and Kansas City. The lines of CP and UP were constructed pursuant to the Pacific Railroad Acts (12 Stat. 489 (1862), 13 Stat. 356 (1864), as supplemented and

amended by various enactments). The line of CP also connects at Ogden with appellee Denver and Rio Grande Western Railroad Company ("DRG") which extends eastward to Denver and Pueblo.* The line of SP is a southern transcontinental route via El Paso which is competitive with the transcontinental routes of which CP is a part. The Supreme Court's determination that control of CP by SP violated the antitrust laws was premised on this competitive relationship.

During the pendency of the antitrust action, the Transportation Act of 1920 was enacted. (41 Stat. 472) This amended Section 5 of the Interstate Commerce Act ("Act") to authorize the Commission to approve the control of one railroad by another and, in connection therewith, to grant immunity from the antitrust laws. Before a decree had been entered in the antitrust action, SP applied to the Commission for approval of its control of CP. Both UP and DRG intervened in opposition. The Commission's report and order appear in *Control of Central Pacific by Southern Pacific,* 76 I.C.C. 508 (1923) (*"Control* case").

In the *Control* case the Commission approved SP's control of CP. It found that "both financially and from the standpoint of service" it was desirable for SP to continue in control of CP. (76 I.C.C. at 520) As to the objections of various intervenors in opposition the Commission stated that it was necessary to consider the following:

> "[W]hether it is possible to authorize the proposed acquisition of control subject to conditions which will remove the opportunity otherwise existing in the Southern Pacific to restrict competition or fetter the

* The line of appellee Western Pacific Railroad Company ("WP") extends from San Francisco to Salt Lake City where it connects with UP and DRG. The lines of WP and CP are competitive.

free and normal flow of interstate traffic by reason of its control of two competing transcontinental routes, and will adequately protect the rights of the Union Pacific and all interests of the public under the Pacific Railroad acts." (*Id.*)

Before setting the proceeding for oral argument the Commission submitted to the intervenors five conditions which had been suggested to the Commission by UP and SP and which the Commission indicated it might attach to any order approving SP control of CP.

The fifth of these conditions ultimately became condition (e) of the Commission's order in the *Control* case. This condition—which is the crux of the present case—deals with preferential solicitation. Condition (e) requires that, in respect of freight traffic between specified territories, SP shall request shippers to specify CP-UP as the route over which their traffic will travel.*

The other four conditions ultimately became conditions (a) through (d) of the Commission's order in the *Control*

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* Condition (e) reads as follows:

"(e) That the Southern Pacific Company shall cooperate with the Union Pacific Railroad Company to secure by active solicitation the routing of the maximum of freight traffic *via* the lines of the Union Pacific Railroad Company and the Central Pacific Railway Company through the Missouri River and Ogden, Utah, as parts of one connected continuous line, between all points in California and Oregon north of and including Caliente and Santa Margarita, Calif., and south of and including the Klamath Falls branch and Kirk, Oreg., on the one hand, and points north and west of a line along the northern boundaries of Oklahoma and Arkansas, to the Mississippi River, thence along the Mississippi and Ohio Rivers (but not including intermediate cities on the Ohio River) to Wheeling, W. Va., and thence on a line drawn just east of Pittsburgh, Pa., and Buffalo, N.Y., to Niagara Falls, N.Y." (76 I.C.C. at 530.)

case. These four conditions generally require that SP shall join with UP in maintaining through service, schedules, and rates over the CP-UP route so as not to discriminate as to time, service, or cost in favor of any other route in which either of them participates.**

At the oral argument in the *Control* case, UP indicated that the five conditions would secure adequately its rights under the Pacific Railroad Acts. DRG also approved the five conditions and indicated that its rights would be safeguarded thereby. Accordingly, the Commission expressed the following conclusions:

> "We think that the rights of the Union Pacific and all interests of the public under the Pacific Railroad acts may be protected by imposing upon the acquisition and exercise of control by the Southern Pacific Company of the Central Pacific the five conditions set out above. We think also that these conditions will so correct and remove any suppression of the normal flow of traffic over the Ogden route that the public interest generally will adequately be protected; and that they will bring

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** The Commission's order in the *Control* case, in addition to the five conditions referred to above, also contained four other conditions, (f) through (i). The Commission (in its 1962 supplemental report, hereinafter discussed) paraphrased these additional conditions:

> "Conditions (f) and (g) concerned the effect of adoption of a complete plan of consolidation of railroads, with the preparation of which the Commission was then charged. These two conditions are no longer applicable. The next condition, condition (h), prohibited the Southern Pacific from disposing of the Central Pacific's securities without prior approval." (317 I.C.C. at 472 n 2.)

Condition (i) provided that the proceeding might be reopened "for the purpose of making such orders as the commission may deem necessary or appropriate supplementary to the present order." (76 I.C.C. at 531.)

about, in connection with transcontinental traffic, a situation as favorable to the public from a traffic and service standpoint as though the Central Pacific were to remain free from Southern Pacific control." (76 I.C.C. at 524)

Following the Commission's decision in the *Control* case SP filed a petition in the antitrust action to give effect to the Commission's order which was, accordingly, made part of the final decree in *United States* v. *Southern Pacific Co.*, 290 Fed. 443 (D. Utah 1923).

In 1957—thirty-four years after the *Control* case—DRG petitioned the Commission to modify condition (e). The modification requested would relieve SP of its obligation to solicit for the UP route east of Ogden but would continue SP's obligation to solicit for the CP route west of Ogden.

Under Section 5(2) of the Act the Commission, to approve a transaction, must find it "consistent with the public interest"; and the terms and conditions attached by the Commission must be "just and reasonable". DRG's petition alleged, among other things, that condition (e) would no longer meet these criteria unless modified as requested.

DRG's petition also asked the Commission to declare unlawful an agreement of May 5, 1924, between SP and UP ("1924 agreement") and certain practices (or activities) of SP and UP. The 1924 agreement contains a number of provisions. Among them is a preferential solicitation undertaking of UP comparable to the preferential solicitation requirement imposed on SP by condition (e). The 1924 agrement also contains a preferential routing agreement in which SP and UP undertake that, in respect of the territories to which condition (e) is applicable, any

traffic not specifically routed by the shipper will be routed via the CP-UP route.*

After a hearing the Commission in 1962 issued a supplemental report and order (the "1962 report" and "1962 order", respectively). *Control of Central Pacific by Southern Pacific*, 317 I.C.C. 469 (1962). Five members of the Commission dissented. The majority rejected DRG's request for modification of condition (e) but did not pass on the 1924 agreement or the practices (or activities) complained of.

DRG then instituted an action in the United States District Court for Colorado to set aside the 1962 order. In 1964 that court determined that the Commission should have passed on the 1924 agreement and the practices (or activities) complained of. The court did not disapprove the Commission's action in the 1962 report in finding that condition (e) continued to be in the public interest and just and reasonable. A remand was ordered "for further proceedings consistent with this opinion". *Denver & R.G. W.R.R.* v. *ICC*, 229 F. Supp. 249, 254 (D. Col. 1964).

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*DRG thus sought to obtain Commission action in three areas:

1. *Solicitation.* This is the activity by which a railroad seeks to have a shipper designate the railroads over which his traffic is to travel. A shipper is free to designate such railroads as he wishes and railroads are obligated, under the Act, to respect the shipper's instructions.

2. *Routing.* This is the activity by which there is designated the railroads over which the shipper's traffic is to travel. This is done by the originating railroad when the shipper has not made such designation.

3. *Practices (or Activities).* These terms have been often used interchangeably in this case and neither term has been used with precision. The court below appears to have confined the terms to practices (or activities) provided for by the 1924 agreement. The terms, however, appeared to have been used by the Commission to embrace matters that do not purport to be within the scope of con-

The Commission accordingly reopened the proceeding** Briefs were submitted and the Commission heard oral argument but no further hearing was held.

On January 6, 1966, the Commission handed down the report and order (the "1966 report" and "1966 order", respectively) which is here in issue. *Control of Central Pacific by Southern Pacific,* 328 I.C.C. 345 (1966). The Commission unanimously concluded—contrary to its conclusion of four years earlier on an identical record—that condition (e) was no longer in the public interest or just and reasonable and should be modified as requested by DRG.*** The Commission also concluded that the preferential solicitation and routing provisions of the 1924 agreement were unlawful.

By order, dated July 1, 1966, the Commission denied appellants' petition for reconsideration, and the present action was then instituted to set aside the 1966 order.

**Statement of Reasons Why the Questions Presented Are Substantial**

The issues in this case have brought forth such a diversity of viewpoints that there can be no doubt of their sub-

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dition (e) or the 1924 agreement. Although the Commission's 1966 supplemental report and order which is here in issue speaks critically of practices (or activities) in the introductory portion of the report, the report does not pass on the practices (or activities) and no reference thereto is contained in the order.

** During the pendency of the proceeding CP was merged into SP pursuant to approval of the Commission. *Southern Pac. Co. Merger,* 307 I.C.C. 806 (1959) (text not published). It was provided, however, that nothing contained in the authorization should be construed as affecting in any way the interests of any of the participants in the instant proceeding.

*** The 1966 order would modify condition (e) to read as follows:

"(e) That the Southern Pacific Company shall continue to secure by active solicitation the routing of the maximum of freight traffic through the Missouri River and Ogden, Utah, between all points in California and Oregon, north of and including Caliente and Santa Margarita, Calif., and south of

stantiality. The decision of the court below was rendered by two of the three judges. The third judge, Chief Judge Robinson, dissented. The majority of the court affirmed the 1966 report and order of the Commission. This report and order reversed the 1962 report and order which, on an identical record, had reached a contrary result. Five of the eleven members of the Commission had dissented from the 1962 report and order.

The substantiality of the issues is also apparent from their magnitude and complexity:

(1) The 1962 and the 1966 reports resulted from a reopening of the 1923 *Control* case. There is a substantial issue whether the *Control* case order reserved jurisdiction to modify conditions (a)-(e), and whether Section 5(9) of the Act confers such jurisdiction. This is an issue of general importance because of the large number of current railroad merger proceedings in most of which the Commission appears to contemplate possible reopening.

(2) Since the Commission's 1966 report reached a result contrary to the 1962 report, there is a substantial issue whether the Commission, as required by the Administrative Procedure Act, 49 U.S.C. §557(c), gave the reasons or basis for its action. The substantiality of this issue is underscored by the fact that in 1962 the Commission gave, as the basis for its decision, four grounds which are largely ignored in the 1966 report.

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and including the Klamath Falls branch and Kirk, Oreg., on the one hand, and points north and west of a line along the northern boundaries of Oklahoma and Arkansas, to the Mississippi River, thence along the Mississippi and Ohio Rivers (but not including intermediate cities on the Ohio River) to Wheeling, W. Va., and thence on a line drawn just east of Pittsburgh, Pa., and Buffalo, N. Y., to Niagara Falls, N. Y." 328 I.C.C. at 358

(3) There are substantial issues as to the meaning of the Pacific Railroad Acts. These issues relate to reciprocal preferential solicitation and routing by the CP and UP routes. The diversity of views which these issues have evoked attest to their substantiality. Appellants contend that the Acts require such solicitation and routing. A majority of the court below, however, decided that the Acts prohibit such solicitation and routing. Chief Judge Robinson, in his dissenting opinion, took a third view that the Acts permit but do not require such solicitation and routing. The views of the Commission have fluctuated: in 1923 and 1962 the Commission felt that the Acts require such solicitation, but in 1966 the Commission was of a contrary view.

(4) There are substantial and novel issues as to the power of the Commission to enjoin voluntary preferential solicitation and routing under the National Transportation Policy and Section 3(4) of the Act. Here, too, the diversity of views underscores the substantiality of the issues. Appellants contend that nothing in the Act prohibits preferential solicitation and that preferential routing is prohibited only if there is affected an appreciable percentage of the traffic involved. The Commission held that all preferential routing is prohibited by the National Transportation Policy and Section 3(4), but that preferential solicitation is prohibited only by the National Transportation Policy. The court below was of the opinion that an appreciable percentage of the traffic involved must be affected before Section 3(4) is violated. The court held, however, that solicitation as well as routing was included in Section 3(4) and that the statute had thus been violated. The substantiality of these issues is emphasized by the fact that, as the court below recog-

nized, preferential solicitation is a common industry practice. The novelty of these issues is apparent from the fact that never before has the Commission or any court sought to condemn voluntary preferential solicitation despite the fact that Section 3(4) has been law for 48 years. The court also went on to hold that preferential solicitation by UP, even though contemplated by the Commission as a result of the imposition of condition (e), did not receive immunity under Section 5(11) of the Act and hence was unlawful. The court reached the unprecedented conclusion that in Section 5(2) proceedings only the carriers participating as applicants in the transaction can benefit from paragraph (11). The increasing tendency of the Commission to attach terms and conditions to its merger authorizations points up the substantiality of this issue.

Finally, the substantiality of the issues is apparent from the importance of the subject matter. This case involves the basic traffic practices of at least three transcontinental railroads, and the volume of traffic affected is enormous. As an example, the eastbound traffic interchanged by the SP to the UP was "6,210,332 tons in 1958." (317 I.C.C. at 475)

**1. The Commission Did Not Retain Jurisdiction To Modify Conditions (a)-(e).**

Appellants contend that the Commission was without jurisdiction to modify conditions (a)-(e) because its 1923 order imposing these conditions did not retain the power to do so. Appellants do not contend, as the court below seemed to feel (p. 5a), that the Commission could not have modified condition (e) had it reserved such power.

The Commission and the court below appear to have recognized that if the Commission is to modify condition (e), it is necessary for the Commission to have reserved the power of modification. Accordingly, the issue is whether the Commission in fact has reserved such power. The Commission and the court below concluded that condition (i) of the *Control* case constituted such a reservation. Condition (i) provides that the proceeding may be reopened for the purpose of making "supplementary" orders.*

Appellants contend, however, that a supplementary order is one which merely assists in carrying out the purpose of the original order. An example would be an order which supplies a deficiency in the original order. On the other hand, the relief granted DRG by the Commission (and sustained by the court below) would alter or modify rather than supplement the Commission's original order.

The correctness of appellants' position was indicated by the Supreme Court in *Baltimore & O. R. R.* v. *United States*, 386 U.S. 372 (1967):

> "Once a valid order is entered by the Commission, it, of course, has the power *to retain jurisdiction* for the

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* Condition (i) follows almost verbatim paragraph (9) of Section 5 of the Act which empowers the Commission to issue "supplemental" orders in Section 5 proceedings. Condition (i) provides:

> "That this proceeding may be reopened at any time by order of the commission either upon the initiative of the commission or, in the discretion of the commission, upon the motion of any person claiming an interest in the matter, for the purpose of making such orders as the commission may deem necessary or appropriate supplementary to the present order." 76 I.C.C. at 531.

The Court below suggests, but does not develop, the additional thought that, even without a reservation of the power of modification, the Commission could modify condition (e) pursuant to Section 5(9). (p. 6a) In the 1966 report, the Commission suggests a like interpretation of Section 5(9). (328 I.C.C. at 357) As discussed in the text, however, Appellants contend that the power to supplement is not broad enough to confer the power of modification.

> purpose of making *modifications* that it finds necessary in the light of subsequent circumstances or to assist compliance with prior conditions previously required or, of course, to correct any errors. The Commission also has power *under* §5(9) *of the Act* to make certain *supplemental* orders and under §17(3) may correct clerical errors in certificates." *Id.* at 387 (emphasis added).

The above quotation is illuminating in two respects. It is a recognition of the difference between "modify" and "supplement".* Also it confirms that if the Commission, in a Section 5(2) proceeding, wishes to have the power to make "subsequent modifications" it must "retain jurisdiction" to do so. It is apparent therefore that reference by the Commission to its power to make supplementary orders does not constitute such a retention of modification jurisdiction.

The court below (p. 6a) referred to *Baltimore & Ohio R.R.*, but, inexplicably, quoted only the first part of the initial sentence of the passage set out above.** Had it quoted both sentences the antithesis between modify and supplement would have been obvious and the court would have been aware of the incorrectness of its position.

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* This distinction is, in fact, apparent from the contrasting language of paragraphs (2) and (9) of Section 5. Paragraph (2) authorizes the Commission to approve a proposal with such "modifications" as the Commission finds to be just and reasonable. Subsequent to such approval, paragraph (9) authorizes the Commission to supplement. Had it been intended that the Commission would subsequently have the power to modify (without reserving such power), paragraph (9) would have used the language of paragraph (2) and spoken of modifying rather than supplementing.

** The court below simply stated:

> "The Commission 'has the power to retain jurisdiction for the purpose of making modifications that it finds necessary in the light of subsequent circumstances. . . .' *Baltimore & O.R.R.* v. *United States*, 386 U.S. 372, 387 (1967)." (p. 6a)

The omission in 1923 from the *Control* case order of a reservation of jurisdiction to modify conditions (a)-(e) was not inadvertent. Condition (i) was a conscious departure from the pattern followed by the Commission in other Section 5(2) proceedings—both before and after the *Control* case. Thus in the *Chicago Junction Case*, 71 I.C.C. 631 (1922) (decided less than a year before the *Control* case) the Commission's order contained the following terminal paragraph:

> "17. Any party or any person having an interest in the subject matter may at any future time make application for such *modification of the above conditions*, or any of them, as may be required in the public interest, and jurisdiction is retained to reopen the proceeding on our own motion for the same purpose." *Id.* at 641 (emphasis added).

Subsequent Commission Section 5(2) decisions have used almost identical language. See, *e.g., Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 492 (1950), sustained *sub nom. New York, & C. & St. L. R. R.* v. *United States*, 95 F. Supp. 811 (N.D. Ohio 1951); *Norfolk & W. Ry. Co. Merger*, 307 I.C.C. 401, 447 (1959). The failure of the Commission to use such language in the *Control* case is decisive that it did not intend to retain the power of modification. Neither the Commission nor the court below, however, recognized that the *Control* case was a complete departure from normal Commission practice.*

The foregoing indicates the incorrectness of the determination of the court below that conditions (a)-(e) were sub-

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* In recent merger proceedings the Commission has continued its practice of a specific reservation of jurisdiction when it wishes to have the power of modification. As the Supreme Court pointed out in *Penn-Central & N.&W. Inclusion Cases*, 36 U.S.L.W. 4093 (U.S. Jan. 16, 1968), the Commission "specifically reserved jurisdiction to reopen proceedings and *modify* the protective *conditions* 'in the light of experience'." (*Id.* at 4100) (emphasis added).

ject to modification. In support of its determination the court observed that a contrary result "could illogically bind our national transportation system to archaic philosophies beneficial only for conditions of the past, but detrimental to the public welfare today". (p. 6a) Such an observation, however, obscures appellants' basic contention that their rights were conferred by the Pacific Railroad Acts. When conditions (a)-(e) were imposed the Commission and the parties to the *Control* case believed, as hereinafter discussed, that conditions (a)-(e) were no more than a statement of the rights of UP under those Acts. Since the Pacific Railroad Acts could not be modified (other than by Congress) there was no reason to contemplate a modification of conditions (a)-(e) by the Commission. For this reason the Commission reserved no power of modification. It is immaterial whether the Pacific Railroad Acts reflect "archaic philosophies" and whether the conditions embodying those Acts appear now to be beneficial "only for conditions of the past". If the Pacific Railroad Acts are "detrimental to the public welfare today" this is the concern not of the courts but of Congress. As Chief Judge Robinson pointed out in his dissenting opinion below: "The rights which are reflected in "condition e" were granted by the Congress; they cannot be deleted by the Commission." (p. 40a)

The parties to the *Control* case acquiesced in the Commission's original order with the knowledge that the power of modification was not reserved. Therefore, even if the Commission now feels (and as the court below believes) that its original construction of the Pacific Railroad Acts was incorrect, this confers no jurisdiction to modify conditions (a)-(e).

Furthermore, even if it be assumed that the Commission has power to modify conditions (a)-(e), the Commission in exercising that power must give weight to the fact that conditions (a)-(e) constituted an agreement between UP and SP. Neither the court below nor the Commission, however, showed any awareness that an agreement was being modified and thereby a fundamental diminution made in the consideration which UP received for the withdrawal of its opposition to SP's application in 1923. Finally, (although SP does not subscribe to this view) UP contends that if it is to be deprived of the consideration for which it bargained, there should be a restoration of the *status quo* before the Commission's decision in the *Control* case. This would leave UP free to renew its opposition before the Commission and the courts to SP's control of the CP route.

**2. The Commission Did Not Give Adequate Reasons or Basis For Reversing Its Determination Of Four Years Earlier, On An Identical Record, That Condition (e) Continued To Be In The Public Interest And Just And Reasonable.**

The Administrative Procedure Act embodies the common law requirement that an administrative agency must give the "reasons or basis" for its decision. 5 U.S.C. §557(c). The Commission in the 1966 report ignored this requirement in concluding that condition (e) was contrary to the public interest and not just and reasonable, as required by Section 5(2) of the Act. The 1966 report gave no explanation as to why, on an identical record, the Commission reached a conclusion the exact opposite of its conclusion of four years earlier that condition (e) met these criteria.

In its 1966 report the Commission intimated that it departed from its 1962 report because of the expansion of

the scope of the proceeding pursuant to the remand of the Colorado District Court in 1964.* This explanation, however, makes no sense. The remand required the Commission to expand the proceeding to include the preferential routing requirement of the 1924 agreement (and any other practices or activities complained of) as well as preferential solicitation. The direction of the Colorado District Court, however, related simply to administrative convenience. It required the Commission to pass on all of the issues raised by DRG rather than simply the issue of whether condition (e) should be modified.

The inclusion of additional issues, however, could in no way have affected the Commission's earlier substantive determination in respect of the issue of preferential solicitation. The validity of preferential solicitation and preferential routing are determinable by different criteria. To take but one example, condition (e) must be reviewed from the standpoint of Section 5(2) of the Act, but this section is not involved in the review of the 1924 agreement. This is apparent from the analysis of the issues by the Commission in the 1966 report. No additional evidence relating to condition (e) was considered by the Commission as a result of the remand. Thus, the introduction of the issue of routing in the proceeding could not, logically, have affected the

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* This explanation is advanced fleetingly in one sentence:

> *"After consideration of the full record, without the procedural limitations before imposed,* we now find that the present effect of the discriminatory practices against the Rio Grande in the preferential solicitation and routing of traffic results in a stifling of competition between the Union Pacific and the Rio Grande on Transcontinental traffic." (328 I.C.C. at 356.) (Emphasis added.)

Commission's prior determination in respect of the preferential solicitation requirement of condition (e).*

Actually, the court below recognized that the explanation given by the Commission for not following its 1962 report makes no sense. Nonetheless the court failed to remand the proceeding, as it was required to do, in order to give the Commission an opportunity to develop a rational basis for the 1966 report. Instead, the court undertook to supply what it conceived to be the basis for the Commission's action. The court speculated that the different result arrived at in the 1962 report had come about because of "an erroneous interpretation of the Pacific Railroad Acts".**

Ironically, the court below, in another context, recognized the impropriety of judicial affirmance of "agency action other than on the grounds invoked by the agency.

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* The court below appears to have recognized that the purpose of the remand was to require the Commission to consider other issues in addition to condition (e). (p. 19a) Yet the court below erroneously states that the remand was to require the Commission to consider "additional evidence" (pp. 1a, 3a). There is no indication in the opinion of the Colorado District Court that, so far as condition (e) was concerned, there was any evidence which the Commission had not considered.

** "However, it is apparent to us, at least, that in 1962 the Commission was guided more by an erroneous interpretation of the Pacific Railroad Acts than it was by considerations 'of public interest'." (p. 19a)

The court nonetheless recognized the anomaly of an agency reaching two completely different results on an identical record:

"Although the 1962 and the 1966 Commission orders lend appearance, as Mr. Justice Douglas says in *Baltimore & O.R.R.* v. *United States*, supra, 386 U.S. at 449 (dissenting in part), of having been 'decided by different regulatory bodies rather than the same commission,' nevertheless we feel there exist sufficient findings to support modification of condition (e) as being no longer 'just and reasonable' nor in accord with the 'public interest'." (p. 22a)

*Burlington Truck Lines* v. *United States*, 371 U.S. 156, 169 (1962)." (p. 30a) An earlier case to the same effect is *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

Even had it been proper, however, for the court below to supply a basis for the 1966 report, the basis suggested would not explain the Commission's departure from its 1962 report. The interpretation of the Pacific Railroad Acts was only one of four grounds relied on in 1962. The other three grounds were ignored by the Commission in the 1966 report and by the court below. And the fourth basis —the Pacific Railroad Acts—was treated in the 1966 report in so irrational a fashion that no illumination is given as to why those Acts were interpreted differently by the Commission four years earlier.

The three additional bases of the 1962 report will now be reviewed. (The Commission's conflicting interpretations of the Pacific Railroad Acts will be treated at pages 24 through 30 hereof.) The court below erred in not requiring the Commission to explain why each of such bases did not continue to require retention of condition (e) in its original form.

(A) In 1962 the Commission stated that in view of the "long-continued reliance" on conditions (a)-(e) by appellants in promoting the movement of traffic via the CP-UP route and developing facilities for its efficient handling, the modification of condition (e) requested by DRG should not be made "in the absence of a compelling showing that, because of changed conditions, the public interest so requires." (317 I.C.C. at 483) The 1962 report found that DRG had not established that the public interest supported modification of condition (e). Specifically, DRG failed to establish that appellants' service was deficient or that DRG could perform a superior service. The Commission ex-

plained in 1962 that, although DRG would benefit from the requested modification, the impact thereof on UP must also be considered. DRG had presented no evidence from which to estimate the adverse consequences on UP although the record indicated that DRG had prospered and its service improved despite the existence of condition (e). (317 I.C.C. at 483) This analysis was ignored by the Commission in its 1966 report; and the court below made no comment on the Commission's failure even to discuss these public interest considerations which, four years earlier on an identical record, the Commission had found decisive. This is bewildering since the court below emphasized in other contexts the significance of the public interest in the Commission's determination. (See, *e.g.*, p. 19a)

(B) Another reason given in the 1962 report for retention of condition (e) in its original form was that condition (e) was one of five conditions imposed as "a single package". The Commission said that it could not modify one condition without concurrent consideration of the other four, and DRG had offered no proof concerning conditions (a)-(d). (317 I.C.C. at 484) The interrelationship of the five conditions, however, is ignored in the 1966 report, and the court below made no comment thereon.

(C) A third inconsistency between the 1962 and 1966 reports relates to the effect which modification of condition (e) would have on the CP route. In 1962 the Commission pointed out that the requested modification would relieve UP from any obligation to solicit the CP route.* Since this would free UP to solicit, for example. the competitive

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* This is because modification would constitute a determination that the Pacific Railroad Acts do not impose a reciprocal obligation on CP and UP to solicit each other's route. This was recognized in the dissenting opinion of Chief Judge Robinson in the court below. (p. 38a)

WP route, it would tend to diminish the volume of traffic UP would interchange with CP. The 1962 report concluded therefore that the requested modification of condition (e) would adversely affect the CP route. (317 I.C.C. at 484) In 1966, however, the Commission reached the opposite conclusion and found that modification of condition (e) would "strengthen and preserve" the CP route. (328 I.C.C. at 354) The Commission did not explain or even mention its earlier, diametrically opposite conclusion. This aspect of the 1966 report was also ignored by the court below.

The explanation advanced by the Commission—the expanded scope of the proceeding—for the differences between the 1966 report and the 1962 report is unsatisfactory for still another reason. Although DRG consented to condition (e) in 1923, the Commission in 1966 concluded that since 1923 a change had occurred in DRG's competitive status which made the requested modification appropriate.* The expanded scope of the proceeding, however, in no way added to the Commission's awareness of any change in DRG's competitive situation. The evidence thereon not only was before the Commission in 1962 but it was considered even more fully then than in 1966. In both the 1962 and 1966 reports the Commission concluded—incorrectly in appellants' view—that DRG was not in 1923 a substantial competitor of UP. In 1962, however, the Commission did not permit this finding to affect its ultimate determination that condition (e) should be retained in its original form.

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* "Had the petitioner's competitive situation at Ogden been more than that of a minor connecting line in 1923, we have no doubt that the requirements of condition (e) would have been different from those actually imposed in the *Control* case." (328 I.C.C. at 356)

From the foregoing it is obvious that the Commission made a 180 degree turn in its thinking between 1962 and 1966. Appellants do not contend that the Commission lacks the power to reverse itself. Appellants do contend, however, that the Commission was required to give a rational explanation for doing so and that the court below erred in not requiring this.*

Furthermore, the Commission's entire approach, so far as DRG's competitive status is concerned, was without rational foundation and, for this reason as well, the court below erred in not remanding the proceeding. As previously mentioned, an essential part of the Commission's 1966 report is its finding that DRG in 1923 was a "minor connecting line" and that DRG has since that date become fully competitive with UP. By the term "minor connecting line" the Commission appears to have meant that DRG was not in 1923 a substantial competitor of UP. This finding, however, is backed by no evidence,** and the Commission's approach is, in any event, unsupportable for at least two reasons. In the first place, there is not a word in the *Control*

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* The applicable law is clear. See *e.g., Baltimore & O. R.R.* v. *United States,* 386 U.S. 372, 389 (1967); *Northeast Airlines, Inc.,* v. *CAB,* 331 F.2d 579 (1st Cir. 1964).

** The evidence to the contrary is overwhelming. For example, by at least 1911—12 years before the Commission's decision in the *Control* case—DRG had been recognized as a major rather than a minor connecting line:

> "The Denver & Rio Grande Company and its allied lines under one control had a through route extending from Ogden, through Denver, Kansas City, and St. Louis, to Chicago and other interior points, and thence by many available connections to New York and the seaboard. This was *obviously a most attractive and powerful rival of the Union Pacific Company, and a constant menace to its success." United States* v. *Union Pacific R.R.,* 188 Fed. 102, 112 (D. Utah 1911) (emphasis added).

Although the Supreme Court reversed the District Court's determination (226 U.S. 61 (1912)) it did not take issue with the District Court's characterization of DRG.

case to indicate that the Commission in 1923 regarded DRG as a minor connecting line or in any other way than as a substantial competitor of UP. Secondly, there is nothing in the *Control* case indicating that the Commission's failure to make DRG a beneficiary of condition (e) in any way related to DRG's competitive situation at that time.*

The *Control* case suggests that the Commission in 1923 regarded DRG as a substantial competitor of UP or at least was aware of the possibility that DRG might shortly become fully competitive. Otherwise there would have been no reason for the Commission in 1923 to seek Rio Grande's views with respect to the conditions to be imposed. Nor would there have been any reason for DRG to oppose SP's application to control CP unless DRG was either a substantial competitor of UP or anticipated becoming one. In other words, unless DRG expected to derive substantial traffic from CP, it would be immaterial whether SP controlled CP.

### 3. The Pacific Railroad Acts Require CP And UP To Solicit And Route Preferentially Each Other's Line.**

The opinion of the court below conveys the impression that the question of whether the Pacific Railroad Acts

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* The court below did not address itself to appellants' arguments. It simply stated:

> "The Commission considered evidence which clearly demonstrated the change since 1923 in the circumstances of Rio Grande as a competing line using the Ogden Gateway." (p. 17a)

Appellants do not dispute that DRG's circumstances have to some extent changed. This, however, does not address itself to appellants' point which is that there is no evidence supporting the Commission's theory of a transformation from a minor to a major connection.

** Appellants contend that the Acts require preferential routing as well as preferential solicitation. Since, however (as hereinafter discussed), the amount of unrouted traffic is minimal, the discussion herein of the Acts will be only in terms of preferential solicitation.

require CP and UP preferentially to solicit each other's line did not arise until the reopening of the *Control* case in 1957. The court began its discussion of the question by pointing out that the Commission's 1962 report supports appellants' interpretation of the Acts but that in 1966 the Commission reversed itself.* The court then concluded that, for the reasons hereinafter discussed, the 1966 report represents the correct construction.

The approach used by the court below ignored the fact that the issue involved had been passed on by the Supreme Court in 1912 and by the Commission in the *Control* case in 1923. In *United States* v. *Union Pacific R.R.*, 226 U.S. 61 (1912) it was indicated that the Pacific Railroad Acts require CP and UP to solicit preferentially each other's line. Although the opinion below quotes from the Supreme Court's decision, the court failed to understand its significance. The holding in that case was that UP control of SP violated the antitrust laws. UP had endeavored to justify such control on the ground that it was necessary to prevent SP (through its control of CP) from discriminating against the CP-UP route in favor of SP's southern route. UP had pointed out to the Supreme Court that traffic formerly received by DRG from CP at Ogden had practically disappeared due to the "favoring attitude of the Southern Pacific to the Union Pacific" (226 U.S. at 90). And, UP argued, if its control of SP were terminated, SP might divert traffic from UP in the same way in which SP had diverted traffic from DRG. The Supreme

* The court did not mention that the Commission reached its 1966 interpretation by ignoring the arguments which it relied on in 1962 to support a contrary interpretation. The Commission in 1962 documented its interpretation by quoting the first paragraph of page 524 of the *Control* case (quoted at pp. 6-7 herein) and by referring to the fact that the Pacific Railroad Acts authorized CP and UP "to form themselves into one consolidated company". (317 I.C.C. at 484)

Court rejected this argument. It said that the practices of SP in diverting traffic (although lawful if practiced against DRG) could not be carried on against UP without violation of the Pacific Railroad Acts. The Supreme Court did not specify what these practices were although it indicated that rate discrimination was not involved—"the former published rates are maintained." (226 U.S. at 90) It would seem, however, from the context of the opinion, that such practices must have consisted principally of preferential solicitation and routing. In other words, the Supreme Court interpreted the Pacific Railroad Acts as requiring CP to prefer, by solicitation and routing, the UP route.*

In 1923 the Commission's report in the *Control* case made it evident that condition (e) was imposed to satisfy the rights of UP under the Pacific Railroad Acts. This was also recognized in the Commission's 1962 report. Both the Commission in 1966 and the court below professed to find, however, that the primary if not sole reason for the imposition of condition (e) in 1923 was to prevent SP from diverting traffic from the CP route to SP's southern

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*The dissenting opinion of Chief Judge Robinson shows an appreciation of the significance of the Supreme Court's opinion:

> "I believe that the opinion clearly indicates that the Union Pacific and Central Pacific were to be given special treatment because of the Acts that created them. While the extent of their rights is not defined, their existence is nevertheless acknowledged." (p. 37a n 4)

Chief Judge Robinson also pointed out (p. 39a) that counsel for the government in *United States* v. *Southern Pacific Co.*, 259 U.S. 214 at 217 (1922), used a like analysis of the Pacific Railroad Acts.

> "'The Pacific Railroad laws imposed on the franchise of the Central Pacific Railroad and on the franchise of the Union Pacific Railroad the reciprocal duty of the one railroad not to discriminate against the other in favor of any other railroad, *but to exert together in normal voluntary cooperation all of the natural forces of a single railroad naturally competing with the parallel Southern Pacific Railroad. . . .*' (Emphasis supplied)"

route via El Paso. It is clear that the prevention of such diversion was one objective of condition (e). But it is equally clear that another objective of condition (e) was to insure that such traffic should move via UP. This is apparent from the two quotations from the *Control* case which are set forth herein at pp. 4-5 and 6-7. In both quotations it is stated that prevention of diversion via El Paso was one objective, but it is also stated that another objective was the protection of UP's rights under the Pacific Railroad Acts. (In fact, in the second quotation (pp. 6-7) the latter objective is mentioned first.) Had the sole objective of condition (e) been the prevention of diversion via El Paso, there would have been no need to mention UP or the Pacific Railroad Acts.

Further proof that the Commission in 1923 felt that preferential solicitation was required by the Pacific Railroad Acts is found in the Commission's use, verbatim, of the language of the Pacific Railroad Acts—"one connected, continuous line"—in three of the conditions: (a), (b) and (e). There would have been no purpose in using these precise words had the Commission not thought that in imposing conditions (a)-(e), it was insuring that CP (under SP control) would fulfill its preferential solicitation and other obligations to UP under the Pacific Railroad Acts.*

Quite apart from the language of the Acts, it is significant that Congress used two corporations rather than one in the construction of the first transcontinental railroad simply because that seemed the most expeditious way of getting the project completed. The general tenor of the

* The quoted language—"one connected, continuous line"— is, of course, only one of several portions of the Acts which, in appellants' view, supports the interpretation that preferential solicitation is required.

Pacific Railroad Acts indicates that the two corporations —CP and UP—after the completion of construction, shall as nearly as possible be operated as one railroad.

The Commission's recognition that conditions (a)-(e) were compelled by the Pacific Railroad Acts is not surprising in view of the oral argument in the *Control* case. Counsel for UP on at least two occasions pointed out that the conditions were no more than an embodiment of some of UP's rights under the Pacific Railroad Acts. Counsel specifically directed the Commission's attention to the fact that the intended effect of condition (e) was to require SP to prefer UP to the detriment of DRG (Tr. 3985-6, 3989).

Neither the 1966 report nor the opinion of the court below analyze the language of the *Control* case or mention the 1923 oral argument.* Nor is there recognition that certain of the language of condition (e) is taken verbatim from the Pacific Railroad Acts.

The court below not only rejected appellants' contention that the Pacific Railroad Acts require preferential solicitation but concluded that the Acts prohibited such solicitation and any other preferential treatment of CP or UP by either of them or any discrimination by either of them against any other railroad. It reached this conclu-

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* The court below in a footnote refers to appellants' argument that it was the understanding of the parties to the *Control* case that condition (e) was in furtherance of the Pacific Railroad Acts. This argument was brushed aside by the court with a quotation of Mr. Justice Brennan that "the ICC is not [the] prisoner of the parties' submissions". (p. 10a n 9) This is, of course, true but it does not deal with appellants' point. Appellants' position here is that, in the *Control* case, conditions (a)-(e) were suggested to the Commission by SP and UP as a way of, among other things, protecting UP's rights under the Pacific Railroad Acts and were imposed by the Commission with this express objective. The 1966 report fails to recognize this.

sion by using two arguments which have never been advanced by any party or have ever been relied on by the Commission or any court.

First, the court below observed that the Pacific Railroad Acts provided not only for the construction of CP and UP but for the construction of three branch lines as well. At least one of these branch lines was to be constructed upon "the same terms and conditions in all respects" as CP and UP. (p. 16a) Therefore, argued the court, how can CP and UP preferentially solicit each other's line since this might discriminate against one of the branch lines. This is not realistic. As Chief Judge Robinson pointed out in dissent, the branch lines were intended as feeder lines for the main line. (p. 35a) The branches were thus not competitive with CP and UP, and preferential solicitation by CP and UP of each other's line could not discriminate against them.*

Second, the court below, in finding that the Pacific Railroad Acts prohibit preferential solicitation, relied on the provision of the Pacific Railroad Acts which authorized other railroads "to connect their road with the road and branches" of CP and UP. (p. 14a) The court also relied on an Act of 1866 which authorized every railroad in the United States to connect with other railroads "so as to form continuous lines . . ." (pp. 14a-15a.) It is difficult to see why the court below attached significance to these provisions. Any obligation of CP and UP to connect with other railroads is in no way inconsistent with the obligation of CP and UP preferentially to solicit each other's lines.

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* Any issue involving the branch lines is, of course, academic since almost from the outset the branch lines became part of UP.

The court below cites and discusses several cases but their relevance is obscure. As previously mentioned, the court quotes (pp. 11a-13a) from the Supreme Court's 1912 decision in *United States* v. *Union Pacific R.R.*, 226 U.S. 61 (1912), but fails to appreciate that it supports appellants' position. The court below also quotes (pp. 13a-14a) from *Union Pacific Ry.* v. *Chicago, R. I. & P. Ry.*, 163 U.S. 564 (1896). But as Chief Judge Robinson observed in his dissenting opinion "neither the questions involved nor the answers given shed light here." (p. 37a) And as to the other cases relied on by the court below, Chief Judge Robinson observed that they "might well be cited in favor of the position taken by the Union Pacific as well as those conclusions for which they were cited." (p. 37a)

**4. The Preferential Solicitation And Preferential Routing Provisions Of The 1924 Agreement Are Not Violative Of The National Transportation Policy Or Section 3(4) Of The Act.**

Two provisions of the 1924 agreement are in issue: (A) the undertaking by UP and SP for the preferential routing of unrouted traffic over each other's line; and (B) the undertaking by UP to preferentially solicit the CP line.

Appellants contend, as previously mentioned, that the Pacific Railroad Acts require UP and CP to preferentially route as well as preferentially solicit each other's line. This contention was rejected by the Commission in 1966 and by the court below. It was held that the preferential routing provision was unlawful because it was contrary to the National Transportation Policy and Section 3(4) of the Act.

As to the preferential solicitation provision of the 1924 agreement the Commission held that it was unlawful because

it was contrary to the National Transportation Policy. This conclusion also was affirmed by the court below which held, additionally, that the preferential solicitation provision of the 1924 agreement was violative of Section 3(4) of the Act.*

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* Furthermore, the court, for no apparent reason, went on to hold that even though the Commission had contemplated, in condition (e), that UP would preferentially solicit the CP route, such solicitation was unlawful. This is an astonishing result since, as the court recognized, such solicitation by UP is the complement of the solicitation (by SP of UP) required by condition (e). (The inclusion of preferential solicitation in the 1924 agreement did no more than create a direct obligation of UP to SP in respect of the solicitation required by the Pacific Railroad Acts. In the absence of such an agreement, SP's right against UP had to be derived through CP.)

Section 5(11) grants immunity, in connection with transactions under Section 5(2), from "prohibitions of law". Yet the court below held that UP could not invoke this provision (in defense of the solicitation by UP contemplated by condition (e)) since immunity was conferred only on the "carrier . . . participating" in the transaction. (p. 24a) Since UP was not an applicant in the *Control* case, the court considered it not a participant in the transaction. This, however, is an utterly technical approach which gives paragraph (11) a construction which has never been used by the Commission or any court. Section 5(11) should be construed as broadly as is necessary in order to insure that the transaction approved by the Commission may be lawfully effectuated. The legislative history of Section 5(11) shows a progressive broadening of the paragraph. In its present form the paragraph obviously seeks to confer maximum immunity. It relieves "any carriers or other corporations, and their officers and employees and any other persons . . ." Even in the form in which it was first enacted in 1920, (41 Stat. 482), the paragraph afforded relief to the "carriers affected", which would have included UP as well as SP. The subsequent amendments obviously were not intended to narrow the scope of paragraph (11). In any event, Section 204 of the Emergency Railroad Transportation Act of 1933 (codified in 49 U.S.C. § 5a) contains a saving clause which causes paragraph (11) in its original form to be applicable in the instant situation.

The construction of paragraph (11) proposed by the court below would seriously impair its utility in carrier unifications. The purpose of paragraph (11) is to make it possible for a transaction to be carried into effect "with the terms and conditions, if any, imposed by the Commission". It must, therefore, have been intended that immunity would be given to any person—whether or not an applicant —whose cooperation would be required to carry out the "terms and conditions."

The Commission held that both the routing and solicitation features of the 1924 agreement were violative of the National Transportation Policy because of their anti-competitive effect. The court below upheld this conclusion on the ground that the Commission's "appraisal of the facts with regard to the National Transportation Policy must stand if there is evidence to warrant the decision" (p. 25a). The court ignored appellants' argument that there is nothing in the National Transportation Policy which is applicable to preferential solicitation or routing. While it is true that the Policy condemns "unjust discrimination, undue preferences or advantages or unfair or destructive competitive practices", this language relates only to "charges for transportation service" and has no conceivable application to solicitation or routing.*

Even if the language of the Policy did relate to preferential solicitation, this would still not confer jurisdiction on the Commission to declare a preferential solicitation agreement unlawful. For such jurisdiction to exist, there must be a section of the Act empowering the Commission to invalidate such an agreement. The National Transportation Policy is simply a general expression of Congressional policy. It may be invoked by the Commission only in connection with the exercise of jurisdiction conferred by some other provision of the Act.

As to preferential routing, it is not disputed that the Commission has jurisdiction to pass on the legality thereof. Section 3(4) of the Act prohibits such routing if the effect

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* The clause from which the quoted language is taken reads as follows:

> " . . .; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; . . ."

is to "unduly prejudice" a connecting railroad. It is appellants' contention that the amount of unrouted traffic here involved was so slight that *undue* prejudice could not result. The record indicates that practically all of the traffic here involved is routed by the shipper. The testimony in 1922 in the *Control* case was that "between 96% and 98% of all the transcontinental traffic is actually routed by the shipper himself." (Tr. 64, 3925) With increasing competition for traffic it is likely that today the volume of unrouted traffic is an even lesser percentage. In 1957 the Commission in *Toledo, P. & W. R. Co. Control,* 295 I.C.C. 523, 536 (1957), sustained *sub nom. Minneapolis & St. L. Ry.* v. *New York, Chicago & St. L. R.R.,* 165 F. Supp. 893 (D. Minn. 1958), *aff'd,* 361 U.S. 173 (1959), found that "all but a very small part of the Nation's traffic is routed by the shipper".

The Commission ignored appellants' argument and held that the preferential routing provision of the 1924 agreement is prohibited by Section 3(4). The court below, however, in one sense, recognized the validity of the approach urged by appellants. (p. 27a) The court nonetheless found that Section 3(4) was being violated because the 1924 agreement requires preferential solicitation as well as preferential routing. This may well be the most astounding feature of the court's decision. Preferential solicitation is, as the court recognized (pp. 29a-30a), a common industry practice. Yet in the 48 years since Section 3(4) was enacted it has never been suggested by the Commission or any court that Section 3(4) applied to preferential solicitation.*

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* In the 1966 report the Commission condemned the preferential solicitation provision of the 1924 agreement solely on the basis of the National Transportation Policy. Since the Commission had not relied on Section 3(4), the issue of its applicability to preferential solicitation was not treated by appellants in their briefs or oral argument in the court below.

On the basis of language alone, it would seem clear that the statute excludes preferential solicitation. Section 3(4) is applicable only to "traffic not specifically routed by the shipper". Yet the purpose of preferential solicitation is to secure shipper routing which thereby takes the traffic out of the category of "traffic not specifically routed".

The court below ignored the language of Section 3(4) and supported its construction by determining that, in effect, preferential routing and preferential solicitation are in substance the same thing:

> "In view of the clear policy expressed by the statute, we see no meaningful distinction between arbitrarily soliciting the unrouted freight at that time and arbitrarily routing it should the shipper leave it unrouted." (p. 28a)

It is apparent that the court overlooked the basic substantive difference between solicitation and routing. This difference is best seen by an analysis of the two activities from the standpoint of a competing carrier. If a shipper should deliver to SP unrouted traffic SP would (if the origin and destination were within the specified territories), under the 1924 agreement, route the traffic so that beginning at Ogden, it would go via UP. As to such traffic—since it has already been delivered to the originating carrier—another railroad such as DRG cannot compete therefor by asking the shipper to route the traffic via DRG at Ogden.

With respect to preferential solicitation, on the other hand, a competitor such as DRG is in an entirely different situation. Solicitation relates only to traffic which the shipper has not yet delivered to the originating carrier. As to such traffic, DRG is in the same competitive posi-

tion as SP or UP. DRG is free to ask the shipper to route the traffic via CP-DRG just as SP or UP are free to ask the shipper to route the traffic via CP-UP pursuant to condition (e) and the 1924 agreement. In fact, the evidence in the instant case is that DRG by preferential solicitation of its own route, in competition with SP and UP, has acquired an increasingly large percentage of the traffic moving via the CP route. In its 1962 report the Commission found, for instance, that DRG's percentage of CP's eastbound traffic increased from 5.7% in 1923 to 30% in 1958 (317 I.C.C. at 481).

In view of the foregoing it is incomprehensible how the court below could characterize preferential solicitation as a circumvention of the Act and an attempt by a carrier "to accomplish indirectly what he cannot do by direct preferential routing" (p. 28a). Such a conclusion can be reached only by ignoring the fundamental competitive difference between solicitation and routing and by ignoring the fact that during the entire period here involved, competition has increased rather than diminished.

The court below, in extending Section 3(4) to embrace preferential solicitation as well as preferential routing, did not indicate that every preferential solicitation agreement is unlawful. Instead, the court suggested that preferential solicitation might be lawful where "special circumstances" were involved. (p. 29a) The court proposed this broad exception in recognition of the fact that the Commission has required preferential solicitation agreements or referred approvingly thereto. It would seem, however, that if Congress had intended, as the court believes, to prohibit preferential solicitation, it would not have contemplated such an indefinite exception or that it could constitutionally do so.

**Conclusion**

For the foregoing reasons, probable jurisdiction of this appeal should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

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Dated: February 26, 1968

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 1159

SOUTHERN PACIFIC COMPANY, *et al.*,
*Appellants,*

—v.—

UNITED STATES OF AMERICA, *et al.*,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

## APPELLANTS' APPENDIX

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IN THE

# United States District Court

FOR THE DISTRICT OF NEBRASKA

Civ. No. 02577

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SOUTHERN PACIFIC COMPANY and
UNION PACIFIC RAILROAD COMPANY,

*Plaintiffs,*

—v.—

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,

*Defendants.*

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Before:

LAY, *Circuit Judge,*
ROBINSON and VAN PELT, *District Judges.*

LAY, *Circuit Judge.*

Plaintiffs, Southern Pacific and Union Pacific seek equitable relief to enjoin the Interstate Commerce Commission from enforcement of a supplemental order, dated January 6, 1966, modifying the Commission's order of February 6, 1923, entitled *Control of Central Pacific by Southern Pacific,* Finance Docket No. 2613.

While the one general issue before us is the legality of the preferential routing and solicitation by the Southern Pacific Company and the Union Pacific Railroad,[1] plain-

[1] This same case was heard by the District Court in Colorado in 1963, but was remanded to the Commission for consideration of additional evidence. The District Court in discussing the issues, observed:

"This preferential solicitation was attacked as being improper or illegal under several sections of the Act as well as the antitrust law.

tiffs argue their case within the framework of two basic questions. First, they challenge the propriety of modifying a condition originally imposed by the Interstate Commerce Commission upon the Southern Pacific when it acquired the Central Pacific Railway in 1923 (the Control case, 76 I.C.C. 508 (1923)). The second question concerns the legality of a 1924 agreement and the practices thereunder, providing for reciprocal solicitation and routing by Union Pacific and Southern Pacific in each other's behalf.

By its 1923 order the Commission approved and authorized, subject to nine conditions, the acquisition by the Southern Pacific of control of the Central Pacific Railway Company through lease and stock ownership. The fifth condition, hereinafter referred to as condition (e), read as follows:

> *"That the Southern Pacific Company shall cooperate with the Union Pacific Railroad Company to secure by active solicitation the routing of the maximum of freight traffic via the lines of the Union Pacific Railroad Company and the Central Pacific Railway Company through the Missouri River and Ogden, Utah, as parts of one connected continuous line,* between all points in California and Oregon north of and including Caliente and Santa Margarita, Calif., and south of and including the Klamath Falls branch

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The origin and the authority for these practices were contained in both condition (e) and the 1924 agreement. These two items constituted the physical evidence of the authority for the practice, but *it was the practice, or the authority for the practice,* which was attacked by the plaintiff, and where this *authority might be physically found would seem to be of minor importance.* Thus in effect there was but one general issue before the Examiner and before the Commission, although in somewhat different context." (Emphasis ours). *Denver & R.G.W. R.R.* v. *I.C.C.*, 229 F.Supp. 249, 253, 254 (1964).

and Kirk, Ore., on the one hand, and points north and west of a line along the northern boundaries of Oklahoma and Arkansas, to the Mississippi River, thence along the Mississippi and Ohio Rivers (but not including intermediate cities on the Ohio River) to Wheeling, W. Va., and thence on a line drawn just east of Pittsburgh, Pa., and Buffalo, N.Y., to Niagara Falls, N.Y." (Emphasis ours.)

At the time, the Denver and Rio Grande Western Railroad (hereinafter the Rio Grande) acquiesced in the 1923 condition. However, in 1957, the Rio Grande sought to reopen the control proceedings for modification of condition (e). In 1962, the Commission in a 6-5 decision refused to modify the original condition so as to eliminate all reference to the Union Pacific. The Rio Grande then sought relief from the District Court in Colorado. The Commission's order was set aside by the District Court and the proceeding remanded for the Commission to consider additional evidence. *Denver & R.G.W. R.R.* v. *I.C.C.*, 229 F.Supp. 249 (1964). Upon reconsideration, the Commission revised its prior holding and modified the condition omitting the Union Pacific's name as originally recommended by the Examiner.[2] The Commission likewise

[2] The modified condition reads:

"*That the Southern Pacific Company shall continue to secure by active solicitation the routing of the maximum of freight traffic through the Missouri River and Ogden, Utah,* between all points in California and Oregon, north of and including Caliente and Santa Margarita, Calif., and south of and including the Klamath Falls branch and Kirk, Oreg., on the one hand, and points north and west of a line along the northern boundaries of Oklahoma and Arkansas, to the Mississippi River, thence along the Mississippi and Ohio Rivers (but not including intermediate cites on the Ohio River) to Wheeling, W. Va., and thence on a line drawn just east of Pittsburgh, Pa., and Buffalo, N.Y., to Niagara Falls, N.Y.;" (Emphasis ours.)

held the 1924 agreement and practices of the Southern Pacific and the Union Pacific contrary to the National Transportation Policy (49 U.S.C. prior to §1), and their preferential routing in violation of Section 3(4) of the Interstate Commerce Act, 49 U.S.C. §3(4).

We sustain the action of the Commission and deny the injunctive relief requested.

It is helpful to understand the routes of the various carriers as demonstrated on the attached map, Appendix A. The Union Pacific operates the route east of Ogden via Cheyenne to Omaha, and also makes interchanges at Denver with the Rio Grande, via routes through northeastern Colorado and central Kansas east to Omaha and Kansas City. The southern route of the Southern Pacific is a transcontinental route from the west coast to Kansas City via El Paso. The Central Pacific, now the Southern Pacific, by complete merger in 1959 (*Southern Pac. Co. Merger,* 307 I.C.C. 806) connects at the Utah Gateway with both the Rio Grande and the Union Pacific and goes west to California.

Western Pacific, an intervening defendant,[3] competes with the Southern Pacific both on its north-south route through California and Oregon *and its east-west route from San Francisco to Ogden.* Western Pacific connects at Salt Lake City with both the Rio Grande and the Union Pacific.

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[3] Western Pacific observes in its brief, p. 10, n. 7:

"In January 1966, Western Pacific filed with the Commission a complaint against Union Pacific and Southern Pacific, alleging that the Agreement of 1924, the Memorandum of 1947, and the preferential practices implemented thereunder violate Section 1 of the Sherman Act, the National Transportation Policy, and Sections 3(4), 5(1) of the Interstate Commerce Act. By stipulation of the parties, a hearing on that complaint is being stayed pending the ultimate disposition of the instant case."

## *Appendix A*

The Rio Grande operates two main lines between Denver and Ogden. One is via Peublo, the other is through the Moffat Tunnel and the Dotsero cutoff. West of Dotsero the lines are identical to Ogden. The Dotsero cutoff and the Moffat Tunnel were opened in 1934, thereby reducing the distance between Denver and Ogden by 175 miles. The Commission observed:

> "The differences in distance, whether in favor of the Southern Pacific-Rio Grande routes or the Southern Pacific-Union Pacific routes, are insignificant from the standpoint of length of hauls [and 'maintenance of schedules'], and therefore the two routes are substantially comparable. . . ." 317 I.C.C. 469, 475-76 (1962).

Under condition (e) and the 1924 agreement between Southern Pacific and Union Pacific, the plaintiffs have been routing and soliciting in favor of each other's lines at the Utah Gateway, in preference to any other interchanging lines.

Plaintiffs now urge that the Commission has no power to reopen the 1923 Control proceeding or to modify condition (e). We disagree. As the Commission said in its 1966 order:

> "[F]uture changes of circumstances were undoubtedly one of the reasons which prompted inclusion of condition (i) reserving jurisdiction to reopen for supplemental orders as appropriate in the light of future events."[4]

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[4] Condition (i), also part of the 1923 I.C.C. order, provides:

> "That this proceeding may be reopened at any time by order of the Commission either upon the initiative of the Commission or, in the discretion of the Commission, upon the motion of any person

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The Commission "has the power to retain jurisdiction for the purpose of making modifications that it finds necessary in the light of subsequent circumstances. . . ." *Baltimore & O. R.R.* v. *United States*, 386 U.S. 372, 387 (1967). See also 49 U.S.C. §5(9). Any rule to the contrary could illogically bind our national transportation system to archaic philosophies beneficial only for conditions of the past, but detrimental to the public welfare today.

We turn to the substantive problems involved. A brief background is necessary. In 1862 and 1864 the Pacific Railroad Acts[5] were passed by Congress. These Acts authorized the building of the first transcontinental railroad in this country which found completion in the historic joinder at Promontory, Utah, of the two roads, the Union Pacific and the Central Pacific, on May 10, 1869.

Thereafter, in 1887, the Interstate Commerce Act was passed, and at that time, as recently observed, the railroads, then "had a practical monopoly of freight transportation . . . and discriminations flourished." *American Trucking Assoc., Inc.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 406 (1967). As other roads began to develop in this country, railroads began to view the competitive future. In 1912 the Supreme Court was confronted with the control of the Southern Pacific by the Union Pacific. This was disapproved in *United States* v. *Union Pac. R.R.*, 226 U.S. 61 (1912), as being a restraint of trade violative of the Sherman Antitrust Act of 1890.

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claiming an interest in the matter, for the purpose of making such orders as the Commission may deem necessary or appropriate supplementary to the present order."

[5] Act of July 1, 1862, ch. 120, 12 Stat. 495; Act of July 2, 1864, ch. 216, 13 Stat. 362 (codified in 45 U.S.C. §83).

*Appendix A*

Thereafter, because of the interlocking financial and physical relationships between Central Pacific and Southern Pacific's California lines, the Southern Pacific was forced to defend a lease and stock acquisition of the Central Pacific. This was similarly denied, with the Supreme Court making this relevant observation:

> "The proof is ample that the policy of the Southern Pacific system has been to favor transportation on its line by securing for itself, whenever practicable, the carriage of freight which would normally move eastward or westward over the shorter line of the Central Pacific Railroad and its connections [the central route], for its own much longer and wholly owned southern route. This course was limited by an arbitrary rule during the time the Union Pacific dominated the Southern Pacific from the stock purchase [of Southern Pacific's stock by Union Pacific] in 1901 until the so-called 'unmerger' in 1913, as the result of the decision of this court in the *Union Pacific Case* [*United States* v. *Union Pac. R.R.*, 226 U.S. 61]. The compelling motive of this course of conduct is obvious. The Southern Pacific owns and controls the southerly route, and receives 100% of the compensation for freight transported by its road and water lines. Over the Central Pacific route it receives but a fraction of the freight because the Union Pacific with its eastern connections takes up the carrying from Ogden to the east. Self-interest dictates the solicitation and procurement of freight for the longer haul by the Southern Pacific lines." *United States* v. *Southern Pac. Co.*, 259 U.S. 214, 231 (1922).

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In 1920 the first Transportation Act was passed. 41 Stat. 456 (1920). It recognized that the "public welfare" would be better served by a national transportation system. Subject to the Interstate Commerce Commission's approval and direction, common carriers could otherwise merge or join together notwithstanding the prohibition of antitrust or other laws.[6]

Immediately thereafter, the Southern Pacific sought authorization from the Commission to acquire control of Central Pacific under the Act, 41 Stat. 480-82, as amended, 49 U.S.C. §5(2) (1964). This was opposed by the Union Pacific. After a long hearing the Union Pacific and others withdrew their objections[7] and the Commission attached to its approval of the merger nine specified conditions. Condition (e), supra, reflected similar concern of the Commission over Southern Pacific's favoring its longer route to the jeopardy of the transcontinental route of Central Pacific and Union Pacific. The newly approved merger

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[6] The Interstate Commerce Act was further amended by the Transportation Act of 1940, 54 Stat. 899.

[7] In the recent order of the Commission denying control of the Western Pacific by either the Southern Pacific or the Santa Fe, the Commission observed:

> "We have considered the possibility of authorizing one or the other of the applicants herein to acquire control of Western Pacific subject to a solicitation condition to safeguard the central route of Western Pacific similar to the condition imposed in the *Central Pacific* case. However, the situation here does not contain the element of intermingled properties and operations necessitating the control authorization in the *Central Pacific* case, *and, moreover, Santa Fe has recorded its objection* to any condition which would require solicitation from its own territories for Western Pacific, either to the West or East of the Utah gateways." *Southern Pacific Co.—Control —Western Pacific R.R.*, 327 I.C.C. 387, 400 (1965). (Emphasis ours.)

and conditions[8] were embodied in the decree of the District Court. 290 F. 443 (D.Utah 1923). No appeal was taken from the order of the Commission or court.

THE PACIFIC RAILROAD ACTS

In the present proceeding the Union Pacific and the Southern Pacific urge that condition (e) is not only lawful but accords with a mandate of the Pacific Railroad Acts. They argue that all conditions attached to the 1923 order by the Commission were nothing more than the fulfillment of the Acts.

Subsequent to the Commission's approval of the acquisition of Central Pacific by the Southern Pacific, an agreement was entered into with the Union Pacific which was theoretically premised upon condition (e). The 1924 agreement (1) obligated Union Pacific and Central Pacific to preferentially solicit for each other, (2) obligated Union Pacific and Central Pacific to preferentially route freight unrouted by the shipper along the Union Pacific and Central Pacific line and (3) expanded the territory of the preferential solicitation and routing beyond condition (e). The failure of the Commission in the 1962 proceeding to consider this agreement and practices thereunder motivated the District Court to remand the case to avoid "splintered issues," under authority of *A. L. Mechling Barge Lines, Inc.* v. *United States*, 376 U.S. 375 (1964).

Plaintiffs similarly defend the 1924 agreement and the practices under the Pacific Railroad Acts, arguing that, like the conditions in the Interstate Commerce Commission order, they too simply embody the statutory benefits

[8] The other relevant conditions generally required the Southern Pacific to cooperate or join the Union Pacific in maintaining service, schedules and rates via the Ogden Gateway and the line of the Central Pacific.

accorded them by the Acts, and therefore cannot be countermanded by order of the Commission.[9]

In 1962, in their first supplemental order, the Commission interpreted the Pacific Railroad Acts in accord with plaintiffs' contention. 317 I.C.C. 469 (1962). Upon reconsideration in its 1966 order, the Commission reversed itself. We feel the 1966 order and its interpretation is in accord with the correct construction of the Pacific Railroad Acts. These Acts provide in part as follows:

> "The track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that, when completed, cars can be run from the Missouri River to the Pacific coast; . . . the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation. so far as the public and government are concerned, as one connected, continuous line; . . ." Act of July 1, 1862, ch. 120, §12, 12 Stat. 495.

> ". . . the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time and transportation, without

[9] Plaintiffs urge that in 1923 it was the mutual understanding of the parties, including the Rio Grande, that condition (e) was in furtherance of the Pacific Railroad Acts and therefore should not be set aside. Apropos here is Mr. Justice Brennan's statement that "the ICC is not prisoner of the parties' submissions." See *Baltimore & O. R.R.* v. *United States*, 386 U.S. 372, 430 (1967) (concurring opinion).

any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others. . . ." Act of July 2, 1864, ch. 216, §15, 13 Stat. 362 (codified in 45 U.S.C. §83).

This language was interpreted by the Supreme Court in *United States* v. *Union Pac. R.R.*, 226 U.S. 61 (1912). Mr. Justice Day stated:

"These acts, it is said, are only intended to secure the permanent physical connection of the roads and to provide for equal accommodations upon the basis of independent carriage, and outline no method by which the two roads can be compelled to make a joint through rate, and that at the time of the stock transfer there was no such provision in the Interstate Commerce Acts. Therefore, it is said that the Union Pacific, no less than the Rio Grande, would have been practically at the mercy of the Southern Pacific in the favorable or unfavorable treatment which might have been accorded to it in the matter of through business to be transported eastwardly. The purpose of Congress to secure one permanent road to the coast so far as physical continuity is concerned is apparent, but we do not think the acts stop with that requirement. It is provided that facilities as to rates, time and transportation shall be without any discrimination of any kind in favor of either of said companies or adverse to the road or business of any or either of the others, and the purpose of Congress to secure a continuous line of road, operating from the Missouri River to the Pacific Coast as one road, is further emphasized in the act of Congress of June 20,

1874, c. 331, 18 Stat. 111, making it an offense for any officer or agent of the companies authorized to construct the roads or engaged in the operation thereof, to refuse to operate and use the same for all purposes of communication, travel and transportation, so far as the public and Government are concerned, as one continuous line, and making it a misdemeanor to refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in favor of or adverse to any or either of said companies." 226 U.S. at 91-92.

Plaintiffs construe the above language of the Court to mean that the Union Pacific and Central Pacific must *prefer* one another to the prejudice of a connecting line, but that no other carrier may discriminate against either of them. This contradicts not only the spirit of the acts, but the plain language as well.

Mr. Justice Day added:

"Such practices of *systematic* and *preconcerted discrimination* as are said to have destroyed the Rio Grande's carrying trade as a connection for the East for business at Ogden would have violated the statute as discriminations adverse to the Union Pacific and be equally violative of the letter and spirit of the acts of Congress. Certainly such discriminations could be restrained by the courts (*Union Pacific Railway Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 163 U.S. 564, 603, 604), and might possibly have

resulted in a forfeiture of all rights under the acts of Congress." (Emphasis ours.) 226 U.S. at 92.

Section 15 of the Act prohibits "discrimination of any kind *in favor of*[10] the road or business of any or either of said companies, *or adverse* to the road or business of any or either *of the others*. . . ." (Emphasis ours.)

The case of *Union Pac. Ry.* v. *Chicago, R.I. & P. Ry.*, 163 U.S. 564 (1896), as cited by Mr. Justice Day, is contrary to plaintiffs' position. Under the authority of the Pacific Railroad Acts, the Supreme Court enjoined the *Union Pacific* from discriminatory practices to other connecting lines. The Union Pacific reasoned it would fail in its public duty by fulfilling a trackage and bridge agreement with connecting roads across the Missouri River. The Court enforced the contracts between the carriers and said:

"For the provisions of the Pacific Railroad acts relating to the bridge over the Missouri River, its construction and operation, imposed on the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars and trains over the bridge and the tracks between Council Bluffs and Omaha. . . ." 163 U.S. at 586.

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[10] The Union Pacific openly acknowledges this construction in a footnote on page 67 of Union Pacific's brief, when it argues:

"The 1864 Pacific Railroad Act prohibits 'any discrimination of any kind *in favor of* the road or business of any or either of said companies and adverse to the road or business of any or either of the others.' (emphasis added) Yet to compel Southern Pacific only to solicit the Central Pacific portion of the Central Pacific-Union Pacific route is discrimination *in favor of* the Central Pacific portion. This is quite apart from the fact that Southern Pacific solicitation via Rio Grande is discrimination against Union Pacific."

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"It is impossible for us to ignore the great policy in favor of continuous *lines* thus declared by Congress, and that it is in *effectuation of that policy* that such business arrangements as will make such connections effective are made." (Emphasis ours.) 163 U.S. at 589.

The original Section 15 of the Act of 1862, and its amendatory provisions, are clear indication that the vision of Congress was not confined to the Union Pacific and the Central Pacific or just their branch lines, nor were their privileges to be forever exclusive:

". . . *any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches* provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto." [11] (Emphasis ours.)

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[11] This section is now codified as 45 U.S.C. §82. Congress recognized that the Act might be further amended when it said:

"*And be it further enacted,* That congress may, at any time, alter, amend, or repeal this act." 13 Stat. 356 §22.

And as observed in *Union Pac. Ry.* v. *Chicago, R.I. & P. Ry.* supra, 163 U.S. at 589:

"On June 15, 1866, an act was approved, c. 124, 14 Stat. 66, 'to facilitate commercial, postal and military communication among the several States,' carried forward as section 5258 of the Revised Statutes; which provided that *'every railroad company in the United States,* whose road is operated by steam, its successors and assigns, be and is hereby, authorized to carry upon and over its road, boats,

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Mr. Justice Strong said in review of the Pacific Railroad Acts in *Union Pac. R.R.* v. *Hall*, 91 U.S. 343, 345-46 (1875):

> "The scheme of the act of Congress, then, is very apparent. *It was to secure the connection of the main line, by at least three branches, with the Missouri and Iowa Railroads, and with a railroad running eastwardly from Sioux City in Iowa*, either through that State or through Minnesota. An observance of this scheme, we think, will aid in considering the inquiry at what place the act of Congress, and the orders of the President made in pursuance thereof, established the eastern terminus of the Iowa branch. From it may reasonably be inferred that the purpose of Congress was *to provide for connections of the branches of the main line of the Union Pacific road with railroads running through the States on the east of the Territory*, and to provide *for those connections within those States, at points at or near their western boundaries.*" (Emphasis ours.)

The purpose of Congress by the passage of the Pacific Railroad Acts was to create a strong link between the East and the West, sufficient to ensure military protection for the isolated areas if needed, as well as a dependable and speedy means of commercial and social access. But it is clear that Congress envisioned not only a single, un-

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bridges and ferries, all passengers, troops, government supplies, mails, freights and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States *so as to form continuous lines* for the transportation of the same to the place of destination.'" (Emphasis ours.)

broken cross-nation line, but a network of railroads feeding and complementing the transcontinental route.[12]

Plaintiffs insist that to afford *equal* solicitation to the Rio Grande at Ogden would constitute discrimination against the Union Pacific under the Pacific Railroad Acts. We cannot agree. Preferences and discrimination are

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[12] Despite numerous attempts during the Congressional debates to cut off the proposed branch lines, the majority consistently voted to retain them for such reasons as Senator Wade of Ohio expressed in his speech of June 19, 1862:

> "I believe the branches are as essential as the main trunk; that they will assist in building it; that they will furnish a motive for the embarking of money in the main line. It will be a mighty lonesome business to commence the main line in a mere wilderness, where it has nothing to attach itself to. You have got to begin it where it will seem to the world of no use whatever. Why, sir, it is like building a bridge across a magnificent river and never framing your abutments, by which you can get on to it. I do not think it is best that this should be done." Cong. Globe, 37th Cong., 2d Sess. 2807 (1862).

In Section 9 of the 1862 Act, the Leavenworth, Pawnee, and Western Railroad Company of Kansas was granted authority to build a line from a point on the Missouri River in Kansas to the Union Pacific line to the north, "*upon the same terms and conditions in all respects* as are provided in this act for the construction of the railroad and telegraph line first mentioned. . . ." (Emphasis ours.) In Section 13, the Hannibal and St. Joseph Railroad Company of Missouri was specifically authorized to connect itself to the new transcontinental route. In the amendatory act passed in 1864, which is to be construed together with the 1862 Act (14 Opinions of Atty. Gen. 233 (1873)), Congress further authorized the Kansas railroad companies to make connection with the proposed Union Pacific line where practicable or desirable; in addition, if the Union Pacific company by the time of such connection was not "proceeding in good faith to build the said railroad through the territories," the Kansas company was authorized to take over the project and build to the junction with the Central Pacific. Sections 9, 12. *In Section 17, the Burlington and Missouri Railroad Company was given specific authority to join its line to the Union Pacific.* For discussion of the decision to include branches and connecting lines within the scope of the Acts, see Russell, Improvement of Communication with the Pacific Coast as an Issue in American Politics 1783-1864 at pp. 296-320 (1948). See also Trottman, History of the Union Pacific 10-22 (1923).

among the prohibitions of the Acts and are in no sense sanctioned by them.[13]

We conclude that plaintiffs' reliance on the Pacific Railroad Acts is unavailing.

MODIFICATION OF CONDITION (e) UNDER §5(2)(a).

Plaintiffs argue alternatively that the Commission did not have sufficient grounds to find that condition (e) was no longer "just and reasonable" under Section 5(2)(a) of the Interstate Commerce Act.

The Commission considered evidence which clearly demonstrated the change since 1923 in the circumstances of Rio Grande as a competing line using the Ogden Gateway. The Commission points out that the "primary objective" of the conditions in the 1923 Control proceeding, wherein stock acquisition by Southern Pacific of Central Pacific was approved, was "the protection of the competitive position of the transcontinental route of the Central Pacific via Ogden against the Southern Pacific's possible preference for its long-haul southern route via El Paso." 328 I.C.C. 345, 354 (1966). The Commission states:

> "The Rio Grande in no way seeks to disturb such a method of operation. But the Rio Grande now also maintains through routes and joint rates with the Southern Pacific at Ogden, and by means of its several eastern connections also operates as one con-

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[13] As the district court stated in *United States* v. *Southern Pac. Co.*, 239 F. 998, 1006-07 (D. Utah 1917), rev'd on other grounds, 259 U.S. 214 (1922):

> "Those statutes require physical connection with the Union Pacific to make a through line and the furnishing of *equal advantages* and facilities as to rates, time, and transportation *without discrimination of any kind.*" (Emphasis ours.)

nected, continuous central or Overland transcontinental line through Ogden and the Missouri River to points beyond, and we now see no valid reason for a continuance of a requirement by this Commission under which Rio Grande is precluded from *equality of treatment* by the Southern Pacific so far as traffic solicitation is concerned. The Rio Grande does not seek to have the Southern Pacific prefer it at the Ogden interchange to the prejudice of the Union Pacific or any other railroad. It only seeks an equal competitive position.

. . . . . .

"Had the petitioner's competitive situation at Ogden been more than that of a minor connecting line in 1923, we have no doubt that the requirements of condition (e) would have been different from those actually imposed in the *Control* case.

"After consideration of the full record, without the procedural limitations before imposed, we now find that the present effect of the discriminatory practices against the Rio Grande in the preferential solicitation and routing of traffic results *in a stifling of competition* between the Union Pacific and the Rio Grande on Transcontinental traffic. *It tends to relegate the Rio Grand to a secondary status as a transcontinental carrier.* The concern of Congress in 1862 and 1864 that there be a strong transcontinental rail line operated as one connected, continuous line, is not thwarted by the existence of several such transcontinental lines operating today.

"Upon reconsideration, we now find that in view of changed circumstances and developments since its

imposition, condition (e) is no longer just and reasonable. Under present day circumstances it is contrary to the public interest and the national transportation policy. The Congressional desire reflected in the Pacific Railroad Acts has been fulfilled by the existence of several central transcontinental routes. The Rio Grande is an important segment of one of these routes. *The national defense and the public welfare of the country will not now be* served by *favoring one of these central transcontinental routes at the expense of another* under present day circumstances." (Emphasis ours.)

Plaintiffs place much significance upon the Commission's original denial of modification in 1962 and subsequent reversal in 1966 after remand "without additional facts before it." However, it is apparent to us, at least, that in 1962 the Commission was guided more by an erroneous interpretation of the Pacific Railroad Acts than it was by considerations of "public interest." Furthermore, at the time of the remand from the district court, nothing had been finally decided. Cf. *United States* v. *U. S. Smelting Co.*, 339 U.S. 186, 198 (1950). Under these circumstances it is "consistent with a concept of administrative power which emphasizes a broad and continuing administrative initiative. . . ." to gauge the Commission's action by the public interest, rather than by its previous statements. See Jaffe, Judicial Control of Administrative Action 714 (1965). And, when the Commission reheard the case in 1966, it did consider as new evidence the 1924 Agreement and the implications and practices thereunder, in accordance with the direction of the remanding district court.

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The Commission found that pursuant to said agreement:

> "In December 1946, representatives of the parties adopted a map on which areas are marked 'as the areas described in the [1924] agreement although the said representatives recognize that the areas so marked are not precisely those described in the language of the agreement and that they are not authorized to modify or supplement the said agreement.' The eastern territory outlined includes western trunkline territory west of the Missouri River in Colorado, Wyoming, Kansas, Nebraska, South Dakota, and North Dakota. Southern Pacific also solicits and routes traffic via Union Pacific from and to Nevada and Utah, and in Oregon, North of Kirk, to but not including Portland.
>
> "Southern Pacific has also agreed to preferentially solicit and route via Ogden and the Union Pacific (1) export and import traffic moving through California ports in the western preferred territory; (2) traffic from or to points on lines constructed or acquired subsequent to the Commission's 1923 order; and (3) traffic requiring stop to complete loading or to partially unload within the preferred western territory where the western origin or destination is located outside of such territory."

The testimony of traffic managers for the plaintiffs indicated that all freight agents were frequently and fully instructed to carry out the solicitation and routing practices outlined by the agreement.

Our National Transportation Policy is said to be "the yardstick by which the correctness of the Commission's

actions will be measured." *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83, 87-88 (1957), as recently cited with approval in *American Trucking Assoc., Inc.* v. *Atchison, T. & S.F. Ry.,* 387 U.S. 397, 421 (1967). Mr. Justice Clark stated in *Baltimore & O. R.R.* v. *United States,* 386 U.S. 372, 386 (1967):

> "This Court has often pointed out that the national transportation policy 'is the product of a long history of trial and error by Congress. . . .' *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 80 (1944). In that case it found that the Transportation Act of 1920 'marked a sharp change in the policies and objectives embodied in those efforts.' *Ibid.* In that Act the Congress directed the Commission to adopt a plan for consolidation of the railroads of the United States into 'a limited number of systems.' 41 Stat. 481 (1920). Consolidation would be approved by the Commission upon a finding that the transaction was in harmony with and in furtherance of the complete plan of consolidation and that the public interest would be promoted. *But the Commission was warned that 'competition shall be preserved as fully as possible.' Ibid.* The initiation of this unification, however, the Congress left wholly with the carriers. The Commission was given no power to compel mergers. *This pattern was carried forward in the Transportation Act of 1940, 54 Stat. 898; however, §5 of the former Act was amended to authorize the Commission to approve carrier-initiated proposals which it found to be consistent with the public interest and upon just and reasonable conditions.*" (Emphasis ours.)

And Mr. Justice Brennan in a concurring opinion, 386 U.S. at 402, observed:

> "The ICC has recognized that inquiry into a proposed transaction does not end with the possibilities for increased economies, but extends to 'the effect of the transaction upon adequate transportation service to all parts of the public which would be so affected, . . .'" [14]

Here, the Commission determined that the routes of the Southern Pacific formed at Ogden with the Union Pacific and the Rio Grande are now "substantially similar." Although the 1962 and the 1966 Commission orders lend appearance, as Mr. Justice Douglas says in *Baltimore & O. R.R.* v. *United States,* supra, 386 U.S. at 449 (dissenting in part), of having been "decided by different regulatory bodies rather than the same commission," nevertheless we feel there exist sufficient findings to support modification of condition (e) as being no longer "just and reasonable" nor in accord with the "public interest."

In this regard, it should be recalled that it is only "our task to scrutinize the Commission's authority, not the substance of its exercise." *American Trucking Assoc., Inc.* v. *Atchison, T. & S.F. Ry., supra,* 387 U.S. at 412. As Mr. Justice Frankfurter said in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 145-46 (1939):

> "So long as there is warrant in the record for the judgment of the expert body it must stand. . . .

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[14] Citing *Chicago, B. & Q. R. Co.—Control,* 271 I.C.C. 63, 146. See also *Detroit, T. & I. R. Co.—Control,* 275 I.C.C. 455, 489, sustained sub nom. *New York, C. & St. L. R.R.* v. *United States,* 95 F.Supp. 811 (N.D. Ohio 1951).

> Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'"

PRACTICES UNDER 1924 AGREEMENT.

Despite the admonition of the District Court of Colorado that the agreements and practices arising from condition (e) must be considered together with the condition itself, plaintiffs nevertheless urge that their practices were not specifically passed upon, and that the 1924 agreement can survive with or without the modification of condition (e) in the *Control* proceedings. There are many reasons why this position must fail.

First, we defer to the approach of the Colorado District Court in construing the condition, agreement and practices as one issue. Notwithstanding plaintiffs' protestations of their own use of awkward language in their 1924 agreement, we join in the observation of the Commission that the agreement was devised for "the stated purpose of arriving at a common understanding of the meaning of the conditions and for making them reciprocally obligatory. . . ." With condition (e) modified, any authority for preferential routing or solicitation between the Union Pacific and Central Pacific must cease. See note 1, supra.

Secondly, these practices between the parties, as we have observed, are not required by the Pacific Railroad Acts, but in fact are in direct contravention of them. The only possible sanction for the practices and the agreement was the original 1923 version of condition (e), which embodied

a Commission-approved exemption pursuant to a provision of the Transportation Act of 1920, now codified as 49 U.S.C. §5(11). However, it is seriously in doubt whether within the *Control* proceedings the Commission could authorize the Union Pacific to preferentially solicit and route for the Southern Pacific (Central Pacific) in contravention of the Pacific Railroad Acts.

It is true that the Commission under Section 5(11) of the Act could grant immunity from the "antitrust laws" as well as from "all other restraints, limitations and prohibitions of law." But it is important to consider that immunity can only be given under Section 5(11) to those "carriers . . . participating in a transaction approved or authorized under . . . this section. . . ." The Union Pacific was not a "carrier. . . . participating" in the merger or lease and stock acquisition of the Central Pacific by Southern Pacific. It is true they intervened to file objections, but it is agreed that the Commission had no jurisdiction over the Union Pacific to impose obligations on it. As the Commission acknowledges, the Union Pacific only acquiesced in the proceedings and conditions set forth.[15] Under these circumstances, the Commisson had no authority to relieve the Union Pacific from any "restraints . . . or prohibitions of law" under Section 5(11). In any event

[15] "Conditions (a) through (d) generally require the Southern Pacific to cooperate or join with the Union Pacific in maintaining service, schedules, and rates via the Ogden gateway and the line of the Central Pacific.

"It was observed in the *Control* case that there was no jurisdiction therein to enforce an order against the Union Pacific or carriers other than the Southern Pacific and Central Pacific. However, the Union Pacific accepted and approved the conditions made, as they apply to the Southern Pacific and its constituent lines, and evinced its intention to comply therewith so far as its cooperation was necessary or required." 317 I.C.C. at 472.

it should be clear, as we have observed, that by modification of condition (e) the Commission has removed any ostensible approval for discrimination by the parties.

Third, the Commission observed that both practices are contrary to the national transportation policy, as declared by the Transportation Act of 1940.[16] As the Commission has observed, the preferential solicitation and routing by the plaintiffs "tends to relegate the Rio Grande to a secondary status as a transcontinental carrier." The Commission found that the preferential soliciting and routing "stifle competition"; that the "public welfare" and "national defense" are better served by the maintenance of several strong, central transcontinental routes; and that "equality of treatment" must be a dominant consideration when dealing with competing lines that are "substantially similar," such as the Union Pacific and the Rio Grande.

The Commission's discretionary appraisal of the facts with regard to the national transportation policy must stand if there is evidence to warrant the decision. *McLean*

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[16] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy." 15 U.S.C. (prior to §1).

*Trucking Co.* v. *United States,* 321 U.S. 67 (1944). Mr. Justice Rutledge commented in *McLean*:

"The national transportation policy requires the Commission to 'promote . . . economical . . . service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, [or] undue preferences or advantages. . . .' . . .

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong.Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' Cf. *Interstate Commerce Commission* v. *Illinois Central R. Co.,* 215 U.S. 452; *Pennsylvania Co.* v. *United States,* 236 U.S. 351; *United States* v. *Chicago Heights Trucking Co.,* 310 U.S. 344; *Purcell* v. *United States,* 315 U.S. 381. If the Commission did not exceed the statutory limits

within which Congress confined its discretion, and its findings are adequate and supported by evidence, it is not our function to upset its order." 321 U.S. at 86-88.

Public interest germane to this case includes (1) adequacy of service, (2) economy and (3) the efficient use of transportation facilities. See *New York Central Securities Co.* v. *United States*, 287 U.S. 12, 24-25 (1932). But also, until we totally evolve a new approach toward railroad consolidation,[17] Congress requires the Commission as well as the courts, to give "consideration of all important consequences including anticompetitive effects." *Denver & R. G. W. R.R.* v. *United States*, 387 U.S. 485, 492 (1967).

Finally, the Commission determined that the preferential *routing* of traffic not routed by the shipper was a direct violation of Section 3(4) of the Interstate Commerce Act. Section 3(4) reads in part as follows: "All carriers . . . shall not . . . unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

Plaintiffs urge that this holding is erroneous since there exists no proof (other than evidence received in 1922 that at that time from 2 to 4 per cent of the freight was unrouted) that sufficient shipping was affected to create "undue prejudice" at the present time by reason of the preferential routing. However, this overlooks the fact that the agreement attacked involves preferential solicitation as well as preferential routing, and that between the two practices 100 per cent of the freight originated by the

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[17] See National Transportation Policy, S.Rep. No. 445, 87th Cong., 1st Sess. 260-61 (1961).

plaintiffs and *not routed before the railroad is contacted,* is either solicited or directly routed for the plaintiffs.[18]

The prohibition of Section 3(4) is against discriminatory conduct of the carrier against connecting lines. The Act cannot be circumvented by wrongfully inducing the shipper to commit the discrimination in place of the carrier. In other words, the legislation is not to be so weakly construed that it permits the carrier to accomplish indirectly what he cannot do by direct preferential routing. In view of the clear policy expressed by the statute, we see no meaningful distinction between arbitrarily soliciting the unrouted freight at that time and arbitrarily routing it should the shipper leave it unrouted.

The statute must be interpreted broadly to effectuate its purposes in the public interest. *B & C Truck Leasing, Inc.* v. *I.C.C.*, 283 F.2d 163, 164-65 (10 Cir. 1960). As is stated in the *Shreveport* case, 234 U.S. 342, 356 (1914), "there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach." In *Western Pac. R.R.* v. *United States,* 382 U.S. 237, 244 (1965), the Supreme Court said:

> "In the absence of any settled construction of § 3(4), then, its manifest purpose to deprive railroads of discretion to apportion economic advantage among com-

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[18] The agreement states, "the parties . . . shall cooperate to secure by active solicitation the *routing of the maximum* of freight traffic via Union Pacific and Central Pacific lines. . . .

"It is understood that such traffic as has origin or destination east of the Missouri River will be *solicited and routed* via the Union Pacific between the Missouri River and Ogden, and via the Southern Pacific west of Ogden; such traffic as has origin or destination west of the Missouri River will be *solicited and routed* via Ogden so as to afford Union Pacific and Southern Pacific respectively the longest practicable haul." (Emphasis ours.)

petitors at a common interchange must be the basic guide to decision."

Thus, we feel that preferential solicitation when done on a "preconcerted" and "systematic" discriminatory basis, as conducted by the parties herein, falls within the statutory prohibition of Section 3(4) as well. The preferential solicitation dictated by the agreement is without concern for competitive benefits of similar lines and without relationship to the best possible service to the shipper. It is as much an apportionment of "economic advantage" as direct routing itself. As plaintiffs argue, preferential solicitation has been referred to without disapproval by the Commission occasionally under *special circumstances*. See, e.g., *Chicago, I. & L. Ry. Co. Reorganization*, 254 I.C.C. 539, 557, 559 (1943), 254 I.C.C. 673, 689 (1944); *Minneapolis, St. P. & S.S.M. Ry. Co. Reorganization*, 252 I.C.C. 525, 574-75, 252 I.C.C. 615, 653 (1942). Of course the present case where Southern Pacific was obliged to solicit for the Central Pacific route rather than its own El Paso route is another example. But special circumstances were involved, such as the reorganization and merger of two formerly separate lines. Discrimination on a purely arbitrary anticompetitive basis, where the connecting lines prejudiced offer equal facilities and service, is far outside the scope of permissible activity and must be disapproved.[19]

[19] As the parties, including the Interstate Commerce Commission, have observed in their briefs and arguments, solicitation on a reciprocal basis, as well as routing, are to some degree found in industry practices. We note the discussion in Conant, Railroad Mergers and Abandonments 34-35 (1964):

> "If the shipper does not control the entire routing of shipment, the initial carrier will be free to choose which connecting carriers will transport the shipment to its final destination. At major connecting

*Appendix A*

Since *all* freight that is not independently routed by the shipper is solicited or routed discriminatorily to the prejudice of the Rio Grande, Section 3(4) prohibits both such practices as being "unduly prejudicial," without further facts before us.

The Commission applied Section 3(4) only to the preferential routing. We are cognizant that we are "powerless" to affirm discretionary agency action other than on the grounds invoked by the agency. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 169 (1962). However, in the construction of Section 3(4), we are not reviewing agency discretion. And although fully relying upon the expertise of the Commission in review of this entire matter, apropos is Professor Jaffe's statement:

> "The judgment of the expert may, as we have seen, be relevant to the decision, but it cannot by reason of its 'pure' quality, its specifically expert character, transform a question of law into a question of fact and so

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points, such as Chicago, St. Louis, Kansas City, and Omaha, an initiating carrier must choose which of a number of connecting lines should receive shipments bound for major cities on two or more routes. In the absence of price competition, the choice is usually made on the principle of reciprocity. A railroad transfers to connecting carriers as many cars as it receives from them, or, if traffic is not balanced in both directions, a railroad transfers cars to connecting carriers in some proportion to cars received.

"But the reciprocity of interchange of connecting railroads is not short-term. A railroad will develop long-run interchange preference patterns to protect its own longest hauls by favoring connecting carriers that are not its rivals for any segment of traffic. Thus, the Chicago and North Western, which has a main line from Chicago to Omaha, has established wide interchange with the complementary Union Pacific which extends from Omaha west to Denver, Ogden, and Portland. Neither the North Western nor the Union Pacific has substantial interchange at Omaha with the Rock Island or the Burlington, both of whose lines run from Chicago to Denver and thus rival the North Western and part of the Union Pacific."

insulate the decision from legal judgment." Jaffe, Judicial Control of Administrative Action, p. 580 (1965).

Other arguments are made by the defendants and intervenors concerning violation of Section 15(1) and of the antitrust laws. Since the Commission has not relied upon these grounds, they require no discussion.

In conclusion, we find no authority under (1) the Pacific Railroad Acts, (2) the National Transportation Policy or (3) Section 3(4) of the Interstate Commerce Act for the plaintiffs' discriminatory routing and solicitation agreement or practices, or for the retention of the original condition. We find the Commission made adequate findings to support the modification of its 1923 order under Section 5(2) of the Interstate Commerce Act.

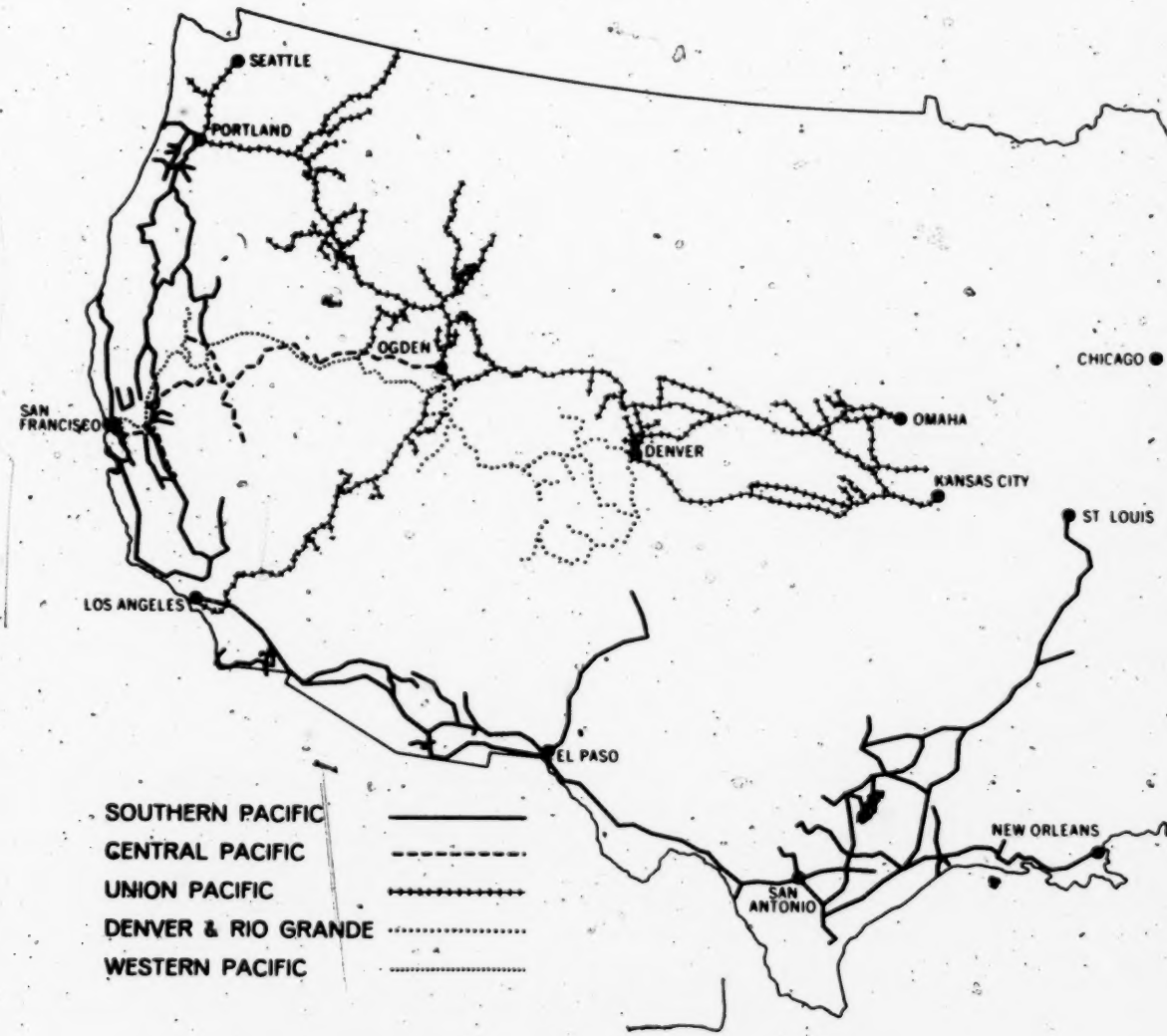
We deny plaintiffs' request to enjoin, set aside, annul and suspend the supplemental order of the Commission dated January 6, 1966, entered in Finance Docket No. 2613, *Control of Central Pacific by Southern Pacific,* and accordingly dismiss the complaint and enter judgment for the defendants herein.

It is so ordered.

*Appendix A*

(See Opposite) ☞






[The map appended to the District Court's opinion could not be reproduced. The above is appellants' rendering of that map.]

*Appendix A*

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

Civ. No. 02577

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SOUTHERN PACIFIC COMPANY and
UNION PACIFIC RAILROAD COMPANY,

*Plaintiffs,*

—v.—

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,

*Defendants.*

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Before:

LAY, *Circuit Judge,*
ROBINSON and VAN PELT, *District Judges.*

ROBINSON, District Judge Dissenting,

I would respectfully submit that the construction of the Pacific Railroad Acts offered by the majority relies too heavily upon a 1967 interpretation of the language chosen. "Discrimination" has become colored by its present use in the Interstate Commerce Act; "branch lines" have assumed proportions far beyond those obviously contemplated by the Acts. One could hardly expect to find language in the Pacific Railroad Acts which would specifically guard against the application of an Interstate Commerce Act not yet envisioned; and any argument based on its absence could not survive its own statement.

## *Appendix A*

The Congress designed the system so that "branch lines" would connect with the "main trunk";[1] the question remains whether they could foresee competing systems. A word used indicates that they did not.

> ". . . the several companies . . . are hereby required to operate . . . as *one* continuous line."

I am constrained to find the "branches" to which discrimination was forbidden were feeder lines, not competitors. The "discrimination" referred to appears to have been directed, in addition to the two segments of the "main trunk", to the branches who were to compete between themselves, not with the "one continuous line".[2] I believe

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[1] "Branch lines" and "main trunk" were the descriptions often given of the system in the Congressional debates; in particular the quotation offered by the majority. Cong. Globe 37th Cong. 2nd Session, 2807 [1862].

[2] Senator Sherman offered the following argument for private ownership of the branch lines: "I hope that this proposition, which will add another prong to this many-pronged railroad, will be voted down, and that the proposition of the Senator from New Hampshire will be adopted, and that we may agree upon the construction of one main Pacific railroad, which may be promptly constructed, and give such reasonable aid as we can to diverging routes, all pointing to the main line, and I think that all these diverging lines ought to be under different corporations. There is one part of this bill that I do not like. I do not wish to criticize it, but I do not think the Pacific Railroad Company ought to build any of these diverging lines. They ought to be built by different companies so that all the diverging lines will compete with each other, and compete with each other fairly, while they all pour their streams of commerce into one great line, which is aided by the Government. But under the operation of the bill as you have it now framed, the Pacific Railroad Company will own one of these branch lines, and may to the sacrifice of other interests involved in these roads divert the whole travel and transportation to one line, thus destroying the property in which you yourself invest to the tune of $16,000 a mile. I think it would be much wiser to leave these various branches to be built by the local interests concerned." Cong. Globe, 37th Cong., 2nd Sess., 2784 [1862].

that Congress intended to create one railroad; the two organizations were formed to accomplish this end and were not intended to diminish their right to operate as such. I would agree that the obligations of the parties under the Acts were fulfilled by mere physical connection and the absence of discrimination between themselves and their branches, but I would not equate fulfillment of duty with exhaustion of rights. The duty of preferential solicitation and routing arises from the control of Central Pacific by Southern Pacific and the arrangements which resulted. In other words, if my interpretation is correct, the Pacific Railroad Act gives the parties the right to agree to exert in concert any lawful competitive force available to them; the control of Central Pacific by Southern Pacific demands that such an agreement be made. It is also worth noting that the separate companies were given the express right to consolidate their corporate structures. Act of July 2, 1864, ch. 120, § 16, 13 Stat. 363.

I do not agree that the cases cited in the majority opinion add weight to the position therein taken. In particular, I cannot agree that in the case of *Union Pac. Ry. Co.* v. *Chicago, R.I. & P. Ry.* [supra][3] the Supreme Court en-

[3] That case was an action for specific performance of certain contracts entered into by the Union Pacific and the Chicago, Rock Island and Pacific Railway Company and the Chicago, Milwaukee and St. Paul Railway Company in which the Union Pacific had leased the use of their bridge across the Missouri to the two latter named companies. The Union Pacific claimed that it had no authority to lease the use of its lines and that the contract was therefore ultra vires. The Court found that the contract did not disable the Union Pacific from fulfilling its obligations to the public. The Court then cited the Pacific Railroad Acts as authority for the proposition that the Congressional policy favored "continuous lines". "It is impossible for us to ignore the great policy in favor of continuous lines thus declared by Congress, and that it is in effectuation of that policy that such business arrangements as will make such connections effective are made." *Union Pacific Ry. Co.* v. *Chicago, R.I. and P. Ry. Co.*, 163 U.S. 564, at 589.

joined "discriminatory practices" under the authority of the Pacific Railroad Acts. Reference to the Acts gave support to the Court's finding of Congressional policy; neither the questions involved nor the answers given shed light here. The other authorities might well be cited in favor of the position taken by the Union Pacific as well as those conclusions for which they were cited. Each of the cases refer to the "main line" and "connecting branches." I would not agree that the language can be transplanted to apply equally to competing systems. Each of the cases recognize that the Acts demand something more than mere physical connection.[4]

The position I have taken is not novel. It was stated by the Interstate Commerce Commission when it originally adopted the five conditions now under review, and cited as the correct interpretation when the Commission first ruled on the petition for reopening and modification. The fol-

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[4] I refer particularly to *United States* v. *Union Pac. R.R.*, 226 U.S. 61 [1912]. As I read that case the Court made two observations which are important here. First, they found that the Pacific Railroad Acts require more than mere physical connection. The Court then listed reasons why they believe that physical connection was not the only requirement; but they did not proceed to define the obligations which did exist. Some light is shed on the question, however, by another comment contained in that opinion. While the Court was not disturbed about discrimination by Southern Pacific against the Rio Grande, they stated definitely that such discrimination against the Union Pacific would be contrary to the Act.

> "Such practices of systematic and preconcerted discrimination as are said to have destroyed the Rio Grande's carrying trade as a connection for the East for business at Ogden would have violated the statute as discriminations adverse to the Union Pacific and be equally violative of the letter and spirit of the acts of Congress. . . ." 226 U.S. at 92.

I believe that the opinion clearly indicates that the Union Pacific and Central Pacific were to be given special treatment because of the Acts that created them. While the extent of their rights is not defined, their existence is nevertheless acknowledged.

*Appendix A*

lowing is taken from *Control of Central Pacific by Southern Pacific,* 317 I.C.C. 469, at 484:

"The existing conditions are consistent with the stated purposes of the Pacific Railroad Acts, and one of the purposes of those conditions is to protect the rights of the Union Pacific and the public under those acts, which are still in force and effect. In imposing the conditions, we stated:

'By virtue of the Pacific Railroad acts the Union Pacific and Central Pacific have certain reciprocal rights, including the right to cooperation in the establishment and maintenance via the Central Pacific-Union Pacific route of through train service and joint rates reasonably necessary to meet competition by other routes, and to cooperation in other respects, to the end that the lines of said companies shall be operated and used as one connected, continuous line. We think that the rights of the Union Pacific and all interests of the public under the Pacific Railroad acts may be protected by imposing upon the acquisition and exercise of control by the Southern Pacific the five conditons set out above. . . .'

The proposed modified condition is directed solely to the protection of the Central Pacific line and, thus, would favor it over the Union Pacific line. Although the proposed modified condition is directed toward continued protection of the Central Pacific line, it would fall short of its purpose as the Union Pacific could not be expected to preferentially solicit for that line in the absence of a reciprocal obligation upon the Southern Pacific. It is clear that mere physical

connection does not satisfy the purposes of the Pacific Railroad acts; and it is noteworthy that both the 1862 act and the 1864 act authorized the roads concerned 'to form themselves into one consolidated company.'"

Even counsel for the Government expressed a similar view of the proper construction of the acts in his argument of *United States* v. *Southern Pac. Co.*, 259 U.S. 214 [1922] at p. 217:

"The Pacific Railroad laws imposed on the franchise of the Central Pacific Railroad and on the franchise of the Union Pacific Railroad the reciprocal duty of the one railroad not to discriminate against the other in favor of any other railroad, *but to exert together in normal voluntary cooperation all of the natural forces of a single railroad naturally competing with the parallel Southern Pacific Railroad. . . .*" [Emphasis supplied]

Most persuasive, in my opinion, is the fact that the Interstate Commerce Commission has recognized and the Pacific railroads themselves have operated under this interpretation for a long period of time. This "long-continued reliance", was made an express finding in the Commission's 1962 decision. *Control of Central Pacific by Southern Pacific* [supra at p. 483]. It is undisputed that the Rio Grande had aspirations at the time the nine conditions were imposed of becoming competitive with the Union Pacific. The Rio Grand participated in the *Control* case; the conditions affected the operation of that route to a certain extent when imposed; the interpretation of the

*Appendix A.*

Pacific Railroad Acts was clearly stated; and the conditions were accepted as reflecting the law up until 1957. The rights which are reflected in "condition e" were granted by the Congress; they cannot be deleted by the Commission. I must therefore, respectfully dissent.

SUPREME COURT, U. S.

MAR 26 1968

JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 1159

SOUTHERN PACIFIC COMPANY, *et al., Appellants,*

v.

UNITED STATES OF AMERICA, *et al., Appellees.*

**On Appeal From the United States District Court for the District of Nebraska**

## MOTION TO AFFIRM OF APPELLEES DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND WESTERN PACIFIC RAILROAD COMPANY

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Dated: March 26, 1968

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---

## MOTION TO AFFIRM OF APPELLEES DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND WESTERN PACIFIC RAILROAD COMPANY

---

Pursuant to Rule 16(1)(c) of the Rules of this Court, Appellees Denver and Rio Grande Western Railroad Company (DRG) and Western Pacific Railroad Company (WP) move that the final judgment of the District Court be affirmed on the ground that the decision below is manifestly correct, and the questions raised by appellants are so unsubstantial as not to require further argument.

**Statement**

This is a direct appeal from a judgment of a three-judge District Court[1] upholding a unanimous decision of the Interstate Commerce Commission which invalidated certain preferential solicitation and preferential routing arrangements of the Southern Pacific Company (SP) and Union Pacific Railroad Company (UP). The decision will eliminate discrimination not only against Appellees WP and DRG but also against the connections of each of these railroads,[2] and will promote increased competition among the transcontinental rail routes.

This case arose because of a decision by DRG in 1957 to request a hearing before the Commission on its contention that changed circumstances after 34 years made it necessary in the public interest to modify one of nine conditions imposed by the Commission prior to permitting SP to retain control of the Central Pacific Railway Company (CP). *Control of Central Pacific by Southern Pacific,* 76 I.C.C. 508 (1923). This one condition, condition (e), obligated SP to engage in preferential solicitation on both eastbound and westbound traffic on behalf of the CP-UP route through Ogden, Utah, and was designed to prevent SP from

[1] The decision of the three-judge court is reproduced at pages 1a to 31a of the Appendix to Appellants' Jurisdictional Statement. The Jurisdictional Statement will hereinafter be cited as "J.S." and the Appendix thereto will hereinafter be cited as "J.S. App.".

[2] WP, for example, connects with the Great Northern at Bieber, California, and with the Santa Fe at several other points in California. DRG has an even larger number of connections. The effect of Appellants' preferential solicitation and routing practices is to discriminate against these connections because freight traffic diverted from WP and DRG may also be lost to their connections.

favoring its much longer and more circuitous route through El Paso, Texas (76 I.C.C. at 520, 524). In 1923, UP was the only practical link over the central route to the Midwest, since, as the Commission subsequently found, DRG, at that time, was no more than "a minor connecting line."[3] However, condition (e) did not impose *any* obligations upon UP.[4] In the 1923 *Control* proceeding, the Commission expressly reserved, in condition (i), the power to reopen the case in order to make "such orders as the commission may deem necessary or appropriate supplementary to the present order" (76 I.C.C. at 531).

Thereafter, without Commission approval, UP and SP concluded a private arrangement—the "1924 Agreement"—which went far beyond the terms of condition (e) under the guise of "clarifying" the condition. This Agreement, for the first time, imposed obligations on UP, namely, to preferentially solicit all freight traffic and to preferentially route all unrouted traffic on behalf of SP. It also went beyond the scope of condition (e) in requiring SP to preferentially route all unrouted traffic on behalf of UP, and it enlarged, as to both UP and SP, the geographic scope of the preferential solicitation and routing arrangement.

Subsequently, in 1957, DRG petitioned to reopen the 1923 proceedings pursuant to condition (i). In this

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[3] *Control of Central Pacific by Southern Pacific*, 328 I.C.C. 345, 356 (1966).

[4] In 1923, there was "no jurisdiction * * * to enforce an order against the Union Pacific or carriers other than the Southern Pacific and Central Pacific." *Control of Central Pacific by Southern Pacific*, 317 I.C.C. 469, 472 (1962).

action, DRG did not seek to abolish condition (e) altogether. To have done so would have left SP free to divert traffic from the central route to its longer El Paso route, just as it might have done in 1923. Instead, DRG sought only to modify condition (e) so that henceforth while SP would still be required to solicit in favor of the central route, DRG would be put on an equal footing with UP on traffic moving through the Utah Gateways. In other words, SP would solicit for the central route but in favor of both UP and DRG instead of in favor of UP only.

WP, an active participant in the 1923 *Control* proceeding, also entered an appearance in the reopened *Control* case. WP has, in fact, filed a separate complaint dealing with this problem.[5] WP's interest and position in this case are the same as DRG's but for slightly different reasons. As noted, DRG is primarily interested in SP's favored treatment of UP at the Utah Gateways. That is why DRG sought modification of condition (e). WP, on the other hand, is primarily interested in UP's favored treatment of SP at the same Gateways. Therefore, WP's chief concern is with the 1924 Agreement and UP's practices pursuant to that agreement.

In its petition to reopen the proceedings, DRG, noting that it had acquiesced in condition (e) when it was imposed in 1923, alleged that competitive conditions over the intervening 34 years had drastically changed

[5] In January 1966, WP filed with the Commission a complaint against UP and SP, alleging that the 1924 Agreement and the preferential practices implemented thereunder violate Section 1 of the Sherman Act (15 U.S.C. § 1), the National Transportation Policy (49 U.S.C. (preamble to § 1)), and Sections 3(4), 5(1) and 15(1) of the Interstate Commerce Act (49 U.S.C. §§ 3(4), 5(1), 15(1)). By stipulation of the parties, a hearing on that complaint is being stayed pending the ultimate disposition of the instant case.

and that the 1923 version of condition (e) was no longer just and reasonable as required by § 5(2) of the Interstate Commerce Act (49 U.S.C. § 5(2)). By a subsequent amendment to its petition, DRG asserted the unlawfulness of the 1924 Agreement and the practices thereunder. The Hearing Examiner received voluminous evidence on the present effect of the existing version of condition (e); the present effect of the 1924 Agreement; and the present effect of the practices of Appellants pursuant to the Agreement. In 1960 the Examiner ruled in favor of DRG; held the 1924 Agreement and practices thereunder to be unlawful; ordered condition (e) modified; and wrote a twenty-page opinion analyzing and evaluating the evidence on each of the three items referred to above. In other words, the Examiner's disposition of the case was precisely in line with the Commission's ultimate disposition of the same matter.

Initially, in 1962, the full Commission, on appeal from the Examiner's ruling, held that the legality of the 1924 Agreement and the practices of Appellants pursuant thereto had to be raised in a separate complaint proceeding. Then, *expressly refusing to consider any of the evidence in the record before the Examiner on the effects of that Agreement and those practices,*[6] a bare majority of six of the eleven members of the Commission decided only that condition (e) had not been shown to be unjust or unreasonable as a matter of law.[7] On appeal by DRG, the Commission was re-

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[6] *Control of Central Pacific by Southern Pacific*, 317 I.C.C. 469, 470-471 (1962).

[7] 317 I.C.C. at 469-485. *See also* Brief of the Interstate Commerce Commission, p. 27, filed in the United States District Court for the District of Colorado on November 15, 1963 in Civ. A. No. 8046.

versed. *Denver & R.G.W. R.R.* v. *ICC*, 229 F. Supp. 249 (D. Colo. 1964). Relying on this Court's decision in *A. L. Mechling Barge Lines, Inc.* v. *United States*, 376 U.S. 375 (1964), the Colorado District Court held that the Commission had erroneously refused to consider the evidence concerning the 1924 Agreement and the practices thereunder; that "the conditions and the Agreement are in reality but two aspects of the same matter"; and that the Commission should reconsider the entire matter as "one general issue." (229 F. Supp. at 253-254).

Pursuant to the mandate of the Colorado District Court, the Commission did reconsider the matter as one general issue, and thus, *for the first time*, examined and evaluated the evidence in the record on the effect of the 1924 Agreement and the practices thereunder and the interaction between that Agreement and those practices on the one hand and condition (e) on the other. In 1966, the Commission unanimously ruled "that the present effect of the discriminatory practices against the Rio Grande in the preferential solicitation and routing of traffic results in a stifling of competition between the Union Pacific and the Rio Grande on Transcontinental traffic." *Control of Central Pacific by Southern Pacific*, 328 I.C.C. 345, 356 (1966). It ordered that condition (e) "be modified by striking therefrom the name of Union Pacific as the only connection of Southern Pacific on traffic moving via Ogden" (328 I.C.C. at 357), thereby placing DRG on an equal competitive footing with UP while still protecting the Ogden route from discrimination by SP in favor of its El Paso route. The Commission further found that the preferential routing provisions of the 1924 Agreement and UP's reciprocal consent to preferential solicitation thereunder had never been authorized by

condition (e) (*ibid.*), and that these practices "are contrary to the national transportation policy" and, in the case of preferential routing, in violation of "the plain meaning of Section 3(4)" of the Interstate Commerce Act (49 U.S.C. § 3(4)) (328 I.C.C. at 357-358).

On appeal by SP and UP, a majority[8] of the three-judge District Court concluded that there is no statutory justification "for the plaintiffs' discriminatory routing and solicitation agreement or practices, or for the retention of the original condition," and sustained the decision. (J.S. App. 31a). That three-judge court decision has now been appealed to this Court.

## ARGUMENT

DRG and WP strongly support the Commission's 1966 decision and its affirmance by the court below, and move that the judgment be affirmed. A reversal of the Commission's 1966 decision would create a monopoly through the central transcontinental corridor by giving UP and SP a totally unfair competitive advantage over two smaller railroads—DRG and WP—and over their connections. A reversal would completely undermine the rationale of the Commission's decision in the *Western Pacific Control* case,[9] where the Commission explicitly rejected attempts by both SP and the Santa Fe to gain control over WP on the grounds that such control would lessen competition via the central route and Utah Gateways, and therefore would be against the

[8] As we demonstrate in argument 3, the dissenting opinion by District Judge Robinson in the court below is based solely on a manifestly erroneous construction of the obligations imposed by the Pacific Railroad Acts, 12 Stat. 489 (1862), 13 Stat. 356 (1864).

[9] *Southern Pacific—Control—Western Pacific Co.*, 327 I.C.C. 387 (1965).

public interest. In addition, a reversal would constitute an unwarranted departure from the national policy endorsed by the Commission and by this Court of permitting smaller railroads to choose between competing as separate entities or becoming part of larger systems.[10] Since, as we show below, Appellants have failed to bring forth a single issue which the District Court resolved incorrectly, this Court should affirm without further consideration.

**1. The Commission Was Authorized To Modify Condition (e).**

It is clear that the Commission was authorized to modify condition (e) by Section 5(9) of the Interstate Commerce Act (49 U.S.C. § 5(9)) and by the reservation of jurisdiction in condition (i) of the 1923 *Control* case.

The Commission is authorized by Section 5(9) to reopen any control proceeding to issue supplemental orders, "if the terms and conditions [originally imposed] have now become unjust and unreasonable." *New Orleans* v. *Texas & N.O. R.R.*, 195 F. 2d 882, 886 (5th Cir. 1952); *accord*: *Baltimore & O. R.R.* v. *United States*, 386 U.S. 372, 387 (1967); *New Orleans* v. *Texas & Pac. Ry.*, 195 F. 2d 887, 889 (5th Cir. 1952); *Baggett Transportation Co.* v. *United States*, 206 F. Supp. 835, 842 (N.D. Ala. 1962). Thus, even if the Commission had failed to insert *any* reservation-of-jurisdiction condition in the 1923 *Control* order, it still had the power, after appropriate notice and opportunity for hearing (which it afforded the parties here), to reopen the proceeding.

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[10] *E.g.*, *Penn-Central Merger & N. & W. Inclusion Cases*, 389 U.S. 486 (1968).

However, the Commission did insert condition (i) in the 1923 *Control* order, reserving jurisdiction to reopen the proceeding "at any time" to make "such orders as the commission may deem necessary or appropriate supplementary to the present order" (76 I.C.C. at 531). Condition (i) clearly envisioned modification of the terms and conditions of the 1923 *Control* order in the light of future changes in circumstances. To hold otherwise would "illogically bind our national transportation system to archaic philosophies beneficial only for conditions of the past, but detrimental to the public welfare today." (J.S. App. 6a). Appellants' effort to distinguish between "supplement" and "modify" and to count the number of cases in which the Commission has used one or the other of these terms strains credulity. All supplementary orders modify because after they are issued, control is exercised under different conditions than before.[11]

**2. After Considering, for the First Time, the Evidence in the Record on the 1924 Agreement and the Practices Thereunder, and Evaluating the Impact of That Agreement and Those Practices on Condition (e), the Commission Properly Concluded in 1966 That Condition (e) in Its Then Existing Form Was No Longer Just and Reasonable and Ought to be Modified in the Public Interest.**

Repeatedly in their Jurisdictional Statement (e.g., pp. 2, 9, 10, 17-24), Appellants assert that the Commission in 1966 was faced with "an identical record" as the Commission in 1962. The incessant repetition of

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[11] One of the definitions of "supplement" is "fill the deficiencies of". Webster's Third New International Dictionary 2297 (14th ed. 1961). Clearly, what the Commission did in 1966 in exercising its power under condition (i) was to fill the deficiencies that had developed in condition (e) in the forty-three years since the original *Control* case was decided.

this phrase is designed to prop up Appellants' argument that the Commission in 1966 should have provided an elaborate explanation of the different result it reached in its second decision. But Appellants obscure the crucial fact that in 1964 the three-judge Colorado District Court reversed the 1962 Commission decision on the ground that the Commission had unduly restricted its consideration of the controversy by refusing to consider the evidence in the record relating to the 1924 Agreement, the practices of UP and SP thereunder, and DRG's contentions that there had been violations of Section 3(4) of the Interstate Commerce Act (49 U.S.C. § 3(4)). *Denver & R.G.W. R.R.* v. *I.C.C.*, 229 F. Supp. 249, 254 (D. Colo. 1964). Thus, although the record may have been physically identical in 1962 and 1966, the record actually considered in 1966 was the full record, while that considered in 1962 was only a partial record.

It is thus clear that the Commission's reasons and the basis for its decision in 1966 were entirely adequate.[12] The Commission in 1966, in fact, was simply supporting the thorough and painstaking initial decision of the Hearing Examiner in 1960. Even though it had these findings to rely upon, the Commission in 1966 went further, re-examined the entire matter anew, and spelled out the reasons for its conclusions in a

[12] In its 1966 report the Commission stated: "As we now see the case, the 1924 agreement and the actions of the parties thereunder cannot be considered in proper perspective without considering condition (e) because of the district court's determination that there is, in effect, but one general issue before the Commission. * * * Thus all evidence and issues are here considered * * *". (328 I.C.C. at 346-347). Again, in its conclusions, the Commission stated: "After consideration of the full record, without the procedural limitations before imposed, we now find * * *". (328 I.C.C. at 356).

twenty-page opinion. Thus, the Commission more than fulfilled its responsibility. *Curtis, Inc.* v. *United States,* 225 F. Supp. 894, 901-902 (D. Colo. 1964).

**3. The Pacific Railroad Acts Do Not Require CP and UP to Solicit and Route Preferentially Each Other's Lines.**

Appellants' contention that the Pacific Railroad Acts, 12 Stat. 489 (1862), 13 Stat. 356 (1864), require CP (and therefore SP) and UP to solicit and route preferentially each other's lines needs little comment. These Acts authorized the construction of UP westward from the Missouri River and of CP eastward to their physical junction near Ogden, Utah, and further provided for the two roads to be operated as far as the public and government were concerned "as one connected, continuous line". Appellants profess to see in the last-quoted phrase a Congressional intent to require preferential solicitation and routing of all freight traffic, to the prejudice of other connecting lines. But as pointed out by the court below, the Acts themselves specifically prohibit just such preferences and discriminations (J.S. App. 16a-17a).

The obligations imposed by the Acts are expressed in quite general terms. Since this is so, and since the Commission is charged with protecting the public interest in the light of changed circumstances, there is a presumption that the Commission's construction of the Acts is correct unless Appellants can demonstrate a clear conflict between the proposed modification of condition (e) and the terms of the Acts. Neither Appellants nor District Judge Robinson in his dissent (J.S. App. 34a-40a) have been able to demonstrate such a conflict. The underlying rationale of Appellants' argument on this issue and of Judge Robinson's entire dissent is that the Pacific

Railroad Acts compel the retention of condition (e) in the form promulgated in 1923, and therefore only Congress can change this requirement. But neither Appellants nor Judge Robinson can point to any language in the Acts which requires such a construction. To the contrary, Section 15 of the Act of 1864 demonstrates conclusively on its face that the Acts require non-discrimination. As the court below recognized, Appellants' suggested construction "contradicts not only the spirit of the acts, but the plain language as well" (J.S. App. 12a).

**4. The 1924 Agreement Was Properly Cancelled by the Commission and the Preferential Practices Pursuant Thereto Were Properly Condemned.**

The preferential relationship between UP and SP, elaborately woven into the terms of the 1924 Agreement, was never submitted to or authorized by the Commission and is clearly unlawful. Appellants' preferential routing agreement is obviously violative of the prohibition in Section 3(4) of the Interstate Commerce Act (49 U.S.C. § 3(4)) against prejudice to a connecting line in the distribution of unrouted traffic, and is contrary to Section 3(4)'s "manifest purpose to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange." *Western Pacific R.R.* v. *United States*, 382 U.S. 237, 244 (1965). Both the preferential routing agreement and UP's preferential solicitation are

clearly "contrary to the public interest and the national transportation policy"[13] (328 I.C.C. at 356).

## CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated: March 26, 1968

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[13] The correctness of this finding seems too apparent for argument. The Policy places upon the Commission the duty to provide for "fair and impartial regulation" of transportation, to "foster sound economic conditions in transportation and among the several carriers," to avoid "undue preferences or advantages, or unfair or destructive competitive practices", and to preserve a national transportation system "adequate to meet the needs . . . of the national defense." 49 U.S.C. (preamble to § 1). Moreover, in determining what are "unfair competitive practices" under the Policy, the Commission has been commended to the antitrust laws." *New York Central R.R.* v. *United States*, 194 F. Supp. 947 (S.D.N.Y. 1961), *aff'd per curiam*, 368 U.S. 349 (1962). This Court also has said that the Commission should give deference to the antitrust laws (*McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944)), and has noted the relevance of the antitrust laws in determining whether an agreement is "contrary to the public interest." *FMC* v. *Svenska Amerika Linien*, — U.S. —, 36 U.S.L.W. 4213, 4215 (1968).

SUPREME COURT, U. S.

APR 11 1968

JOHN F. DAVIS, CLERK

No. 1159

# In the Supreme Court of the United States

OCTOBER TERM, 1967

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SOUTHERN PACIFIC COMPANY, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA*

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## MOTION TO AFFIRM

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# In the Supreme Court of the United States

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No. 1159

SOUTHERN PACIFIC COMPANY, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA*

---

## MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission jointly move that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal from a district court decision (J.S. App. 1a-31a; 277 F. Supp. 671) sustaining the report and order of the Interstate Commerce Commission ending certain preferential arrangements between the Southern Pacific Company

and the Union Pacific Railroad Company, and affording equal competitive opportunities to other connecting railroads which provide service over the central transcontinental routes—specifically, the Denver & Rio Grande Western Railroad Company and the Western Pacific Railroad Company, which are the other appellees here.

The present case has its origins over a century ago when, there being no rail lines west of the Missouri River, the Congress authorized and largely financed the construction of the first transcontinental railroad. Act of July 1, 1862, 12 Stat. 489; Act of July 2, 1864, 13 Stat. 356 (Pacific Railroad Acts). The line, to parallel the 42nd meridian between San Francisco and Omaha, was to be built by two companies, the Central Pacific from the west and the Union Pacific from the east, and their meeting at Promontory Point, Utah, in 1869 is legendary.

Within the next 50 years several competing rail routes to the Pacific coast were completed. They were controlled and monopolized by certain interests until the enactment of the antitrust laws; thereafter, that monopoly was gradually dismembered pursuant to landmark decisions of this Court. *Northern Securities Co.* v. *United States*, 193 U.S. 197; *United States* v. *Union Pac. R. Co.*, 226 U.S. 61; *United States* v. *Southern Pac. Co.*, 259 U.S. 214.

In 1922, this Court ordered the Southern Pacific to divest itself of its control of the Central Pacific, finding that "the policy of the Southern Pacific system has been to favor transportation on its line by securing for itself, whenever practicable, the carriage

of freight which would normally move eastward or westward over the shorter line of the Central Pacific Railroad and its connections, for its own much longer and wholly-owned southern route" (*United States* v. *Southern Pac. Co.*, *supra*, 259 U. S. at 231).[1]

While that case was pending, Congress had enacted the Transportation Act of 1920. Among other things, that Act provided that Interstate Commerce Commission approval of a railroad consolidation could exempt it from the antitrust laws (49 U.S.C. 5(11)). Availing itself of this new provision, the Southern Pacific promptly applied to the Commission for permission to retain control of the Central Pacific, and the Commission granted it, subject to conditions to prevent abuses such as had been described by this Court. *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508. To that end, condition (e) of the 1923 Commission order approving the acquisition obliged the Southern Pacific preferentially to solicit traffic over the Central Pacific-Union Pacific route (76 I.C.C. at 530); that is, in the defined territory the Southern Pacific was to use its best efforts to have traffic routed via the Central Pacific-Union Pacific route to and from the midwest, rather than via its own longer, southern transcontinental route. By condition (i), the Commission expressly reserved the power to reopen the proceeding to make "such orders as the Commission may deem necessary or appropriate supplementary to the present order" (76 I.C.C. at 531).

[1] The location of the lines of the various railroads which provide transcontinental service over central routes are shown on the map at J.S. App. 33a.

The Rio Grande, a party to the proceeding, offered no objection to the Commission's authorization of the control relationship, as conditioned (76 I.C.C. at 522).

Thereafter, in 1924, the Southern Pacific and the Union Pacific entered into a private agreement which established a preferential relationship far beyond the terms of condition (e), which provided for preferential solicitation by the Southern Pacific for the Union Pacific. The 1924 agreement also obliged the Union Pacific preferentially to solicit traffic for Southern Pacific, required each railroad to route all unrouted traffic over the lines of the other, and enlarged the geographic area embraced by condition (e). That agreement was never approved by the Commission.

In 1957 the Rio Grande filed with the Commission a petition seeking reopening of the *Control* case and modification of condition (e) so as to eliminate the discrimination in favor of the Union Pacific and to place it on an equal basis in competing for Southern Pacific-originated traffic moving over the central transcontinental rail routes. Noting that it had acquiesced in the conditions when they were imposed in 1923, the Rio Grande alleged that competitive conditions over the intervening 34 years had drastically changed and that condition (e) was no longer just and reasonable. By a subsequent amendment to its petition, Rio Grande further asserted the unlawfulness of the 1924 private agreement and the practices of the parties thereunder.

In its final decision,[2] the Commission found "that

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[2] In its first decision (317 I.C.C. 469), the Commission had held that the legality of the 1924 agreement and the practices

the present effect of the discriminatory practices against the Rio Grande in the preferential solicitation and routing of traffic results in a stifling of competition between the Union Pacific and the Rio Grande on Transcontinental traffic" (328 I.C.C. at 356). The Commission ordered that condition (e) "be modified by striking therefrom the name of Union Pacific as the only connection of Southern Pacific on traffic moving via Ogden" (328 I.C.C. at 357)—thus placing the Rio Grande in an equal competitive position with the Union Pacific, while still protecting the Ogden route from discrimination in favor of the Southern Pacific. Noting that the preferential routing agreement and Union Pacific's reciprocal obligation of preferential solicitation had never been authorized by condition (e), the Commission further held that such discriminatory practices "are contrary to the national transportation policy" and, in the case of preferential routing, in violation of "the plain meaning of Section 3(4)" of the Interstate Commerce Act (328 I.C.C. at 357-358).

On appeal a majority of the statutory three-judge court sustained the decision, finding that the Commission had ample regulatory authority to modify

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of the parties thereunder must be raised in a separate complaint proceeding, and ruled only that condition (e) had not been shown to be unjust or unreasonable as a matter of law. Reversing that decision, the United States District Court for the District of Colorado concluded that "the conditions and the agreement are in reality but two aspects of the same matter," and directed the Commission to consider the matter as "one general issue." *Denver & Rio Grande Western R. Co. v. United States,* 229 F. Supp. 249, 253-254.

condition (e) where it had been demonstrated that the condition was "no longer 'just and reasonable' nor in accord with the 'public interest' " (J.S. App. 22a), and that there was no statutory justification "for the plaintiffs' discriminatory routing and solicitation agreement or practices, or for the retention of the original condition" (J.S. App. 31a).

## ARGUMENT

The Commission acted plainly within its discretion in outlawing the discriminatory practices of the Southern Pacific and the Union Pacific, and there is no issue warranting plenary consideration by this Court.

1. The Commission clearly had jurisdiction to modify condition (e) so as to place the Rio Grande in an equal competitive position with the Union Pacific. "[T]he power to retain jurisdiction for the purpose of making modifications that it finds necessary in the light of subsequent circumstances" (*Baltimore & O. R. Co.* v. *United States*, 386 U.S. 372, 387) was expressly exercised by the Commission in condition (i) of the order authorizing Southern Pacific's control of the Central Pacific in 1923, and the record clearly supports its finding that, under present circumstances, the discriminatory treatment of the Rio Grande is no longer just and reasonable.

Appellants' argument is based solely upon an overly technical construction of the phraseology used in condition (i), which would defeat the clear intention of that provision. The reservation of jurisdiction to reopen the proceeding "at any time" to make "such

orders as the Commission may deem necessary or appropriate supplementary to the present order" (76 I.C.C. at 531) clearly contemplated modification of the terms and conditions of the order in light of future changes in circumstances. Appellants' construction of condition (i) as authorizing only supplementary orders which do not result in modification of the prior terms and conditions is unwarranted, and would "illogically bind our national transportation system to archaic philosophies beneficial only for conditions of the past, but detrimental to the public welfare today" (J.S. App. 6a).[3]

Finally, we suggest that appellants' purported distinction between a "modification" and a "supplemental order" is meaningless. Any "supplement" to a prior order must necessarily result in a "modification" of that order, and the phraseology used in a particular case is of no significance.

2. The preferential relationship created by appellants' 1924 private agreement—which was never approved by the Commission—is clearly unlawful. Appellants' preferential routing agreement, which excludes the Rio Grande and the Western Pacific from all traffic not specifically routed by the shipper, is in flagrant violation of the prohibition of Section 3(4) of the Interstate Commerce Act against prejudice to

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[3] Even apart from condition (i), the Commission is empowered by Section 5(9) of the Act to reopen any control proceeding to issue supplemental orders. "If the terms and conditions * * * have now become unjust and unreasonable, a showing to that effect can be made to the Commission for a supplemental order." *City of New Orleans* v. *Texas & N.O. R. Co.*, 195 F. 2d 882, 886 (C.A. 5).

a connecting line in the distribution of unrouted traffic, and contrary to that statute's "manifest purpose to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange" (*Western Pac. R. Co.* v. *United States*, 382 U.S. 237, 244). Both the preferential routing agreement and the Union Pacific's preferential solicitation, which result "in a stifling of competition between the Union Pacific and the Rio Grande on Transcontinental traffic," are "contrary to the public interest and the national transportation policy" (328 I.C.C. at 356).

3. Appellants' discriminatory practices are in no way justified by the Pacific Railroad Acts. While these Acts "prohibit the two named lines from discriminating against each other, they do not require or authorize either the Southern Pacific or the Union Pacific to prefer each other to the point of unduly discriminating against another connecting line such as the Rio Grande and its eastern connections" (328 I.C.C. at 355). Prohibiting "practices of systematic and preconcerted discrimination" *against* each other (*United States* v. *Union Pac. R. Co.*, 226 U.S. 61, 92) is a far cry from authorizing the two railroads to cooperate *with* each other in joint discrimination against other railroads. Such discrimination "contradicts not only the spirit of the acts, but the plain language as well" (J.S. App. 12a).[4]

[4] Appellants are in error in claiming (J.S. 26-28) that the Commission's 1923 *Control* decision indicates a different construction of the Pacific Railroad Acts. On the contrary, the Commission specifically noted in its 1923 decision that "the rights of the Union Pacific and all interests of the public under

Moreover, appellants misconstrue the basic nature of the Pacific Railroad Acts. This legislation was enacted in 1862 and 1864 for the purpose of facilitating the construction and operation of a coast-to-coast rail connection. The insistence upon cooperation between the two lines—the Union Pacific from the East and the Central Pacific from the West—was merely to insure that a smoothly functioning system would not be disrupted by competitive struggles between the two companies. The Acts did not provide for, nor contemplate, the eventual existence of parallel coast-to-coast lines which would enter into direct competition with the Union Pacific-Central Pacific complex. The Pacific Railroad Acts' provision for cooperation along the single (and at that time the only) transcontinental rail connection was adopted solely to safeguard the public interest and convenience; in no sense can it be cited as justification for the type of discrimination involved here.

4. Finally, appellants attempt to rely (J.S. 17-24) upon the fact that in its earlier decision—reversed by the district court—the Commission had expressed the view that condition (e) had not been shown to be unjust and unreasonable as a matter of law. Following the remand, however, the Commission had before it as new evidence the "implications and practices" relating to the 1924 agreement (J.S. App. 19a), the anticompetitive consequences of which it had initially

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the Pacific Railroad acts" (76 I.C.C. at 524) would be protected by conditions (a) through (e)—which did not authorize the preferential routing agreement or Union Pacific's preferential solicitation.

declined to consider.[5] In any event, as the court below emphasized, the Commission's final decision must be judged "by the public interest, rather than by its previous statement," particularly where, "at the time of the remand from the district court, nothing had been finally decided" *(ibid.)*. The reasons and basis for the Commission's unanimous conclusion that appellants' discriminatory practices are unlawful were fully set forth; accordingly, the requirements of the Administrative Procedure Act were amply satisfied. 5 U.S.C. (Supp. II, 1965-66) 557(c); *Minneapolis & St. L. Ry. Co.* v. *United States*, 361 U.S. 173, 192-194; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 531-532.

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[5] Although the record in the two proceedings may have been physically identical, the Commission was charged, by the Colorado district court decision (see note 2, *supra*) which reversed its 1962 decision, with considering the evidence in the record relating to the 1924 agreement and the legality of the practices thereunder—which it had previously not taken into account—in the proceeding on remand (see 328 I.C.C. at 346-347).

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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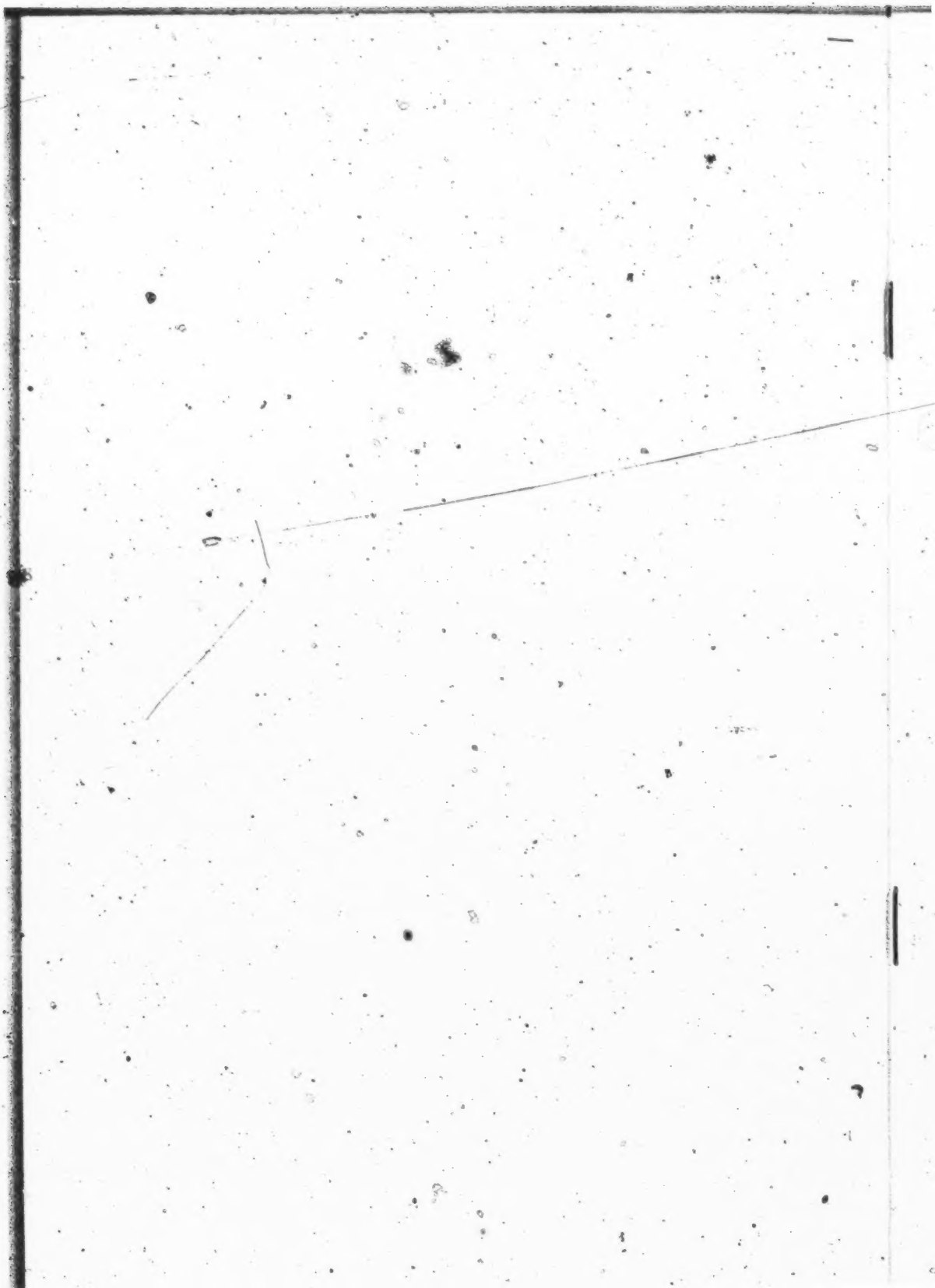

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 1159

SOUTHERN PACIFIC COMPANY, *et al.*,
*Appellants,*

—v.—

UNITED STATES OF AMERICA, *et al.*,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

APR 23 1968
JOSEPH F. SPANIOL, JR., CLERK

## BRIEF OF APPELLANTS SOUTHERN PACIFIC COMPANY AND UNION PACIFIC RAILROAD COMPANY IN OPPOSITION TO MOTIONS TO AFFIRM

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### Introduction

This brief is submitted in opposition to (1) the joint motion to affirm of the United States and the Interstate Commerce Commission ("US Motion"), and (2) the joint motion to affirm of DRG and WP ("DRG Motion").

Both motions have been made pursuant to Rule 16(1)(c) of this Court which requires the moving party to establish "that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." Neither motion, however, discusses or even mentions, the substantiality of the questions

fected before Section 3(4) is violated. But the court held that solicitation as well as routing was embraced by Section 3(4) and that therefore the statute had here been violated. The Commission has never previously condemned preferential solicitation either pursuant to the National Transportation Policy or otherwise; nor has any court (or the Commission), in the 48 years during which Section 3(4) has been law, ever previously interpreted the statute as condemning preferential solicitation. The failure of appellees to analyze carefully these issues is one of the more shocking features of the motions to affirm.

(5) The issue of the scope of the immunity provision of Section 5(11) of the Interstate Commerce Act is substantial since that statute may be involved in merger proceedings currently before the Commission. The substantiality of the issue is underscored by the fact that the court below interpreted Section 5(11) in a manner never adopted by the Commission.

**The Correctness of the Decision of the Court Below**

Appellants' Jurisdictional Statement demonstrates that the court below erred in five fundamental respects. (pp. 12-35) Certain of these errors are discussed in the motions to affirm. The discussion, however, is fragmentary, and the majority of appellants' arguments are ignored. To give but one example, appellants argued (pp. 20-22) that the Commission in 1966, in reversing its 1962 report, erred in failing to explain why the four bases relied on in the earlier report no longer were determinative. The motions to affirm completely ignore appellants' argument and fail to discuss a single one of the four bases of the 1962 report.

Furthermore, the motions to affirm, despite their brevity, contain serious misstatements. Some of these misstate-

ments will be referred to simply for the purpose of indicating that the motions should be read with extreme caution:

(1) Both motions state that in 1962 the Commission did no more than hold that condition (e) was not unjust and unreasonable "as a matter of law." (fn. 2, pp. 4-5 of US Motion; p. 5 of DRG Motion) This is incorrect. Nowhere in the 1962 report is there the slightest intimation that the Commission's determination was confined to issues of law. As appellants' Jurisdictional Statement explains (pp. 20-22), the Commission in 1962 discussed and resolved a variety of factual issues. Additionally, the Commission's order in 1962 recited that the Commission had filed its report "containing its findings of fact and conclusions thereon."*

(2) Both motions state that the 1924 agreement was "never approved by the Commission." (US Motion pp. 4, 7; DRG Motion p. 12) This is literally *true but the* statement is misleading. The Interstate Commerce Act contains no provision either requiring or authorizing the Commission to approve such an agreement and the Commission did not find in this proceeding that it had the power to approve such an agreement. Nor has it ever contended that it had such power.

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* The motions to affirm seek to create the impression that the Colorado District Court remanded the 1962 report because of the failure of the Commission to consider evidence as to the justness and reasonableness of condition (e). The opinion of the Colorado Court, however, makes it clear that the sole purpose of the remand was to require the Commission to consider other issues in addition to condition (e). *Denver & R.G.W.R.R.* v. *ICC*, 229 F. Supp. 249, 254 (1964). Moreover, the Colorado Court, at p. 252, detailed the factual determinations which had been made by the Commission in support of its 1962 report.

(3) The US Motion (p. 4) refers to condition (i) of the 1923 *Control* case which provided that the Commission should have the power to make "supplementary" orders. The US Motion then states that DRG in 1923 indicated to the Commission that it was agreeable to SP control of CP "as conditioned." This is a dangerously garbled account of the evolution of the conditions attached to the Commission's order in the *Control* case. At the suggestion of SP and UP the Commission in 1923 had submitted, for the consideration of the parties to the *Control* case, five conditions which ultimately became conditions (a)-(e). On the basis of these five conditions DRG indicated that it would not object to Commission approval of SP's application. Condition (i), as well as conditions (f), (g) and (h), were subsequently added by the Commission to its order and obviously could have played no part in DRG's assent.

(4) The US Motion (p. 9) states:

> "The [Pacific Railroad] Acts did not provide for, nor contemplate, the eventual existence of parallel coast-to coast lines which would enter into direct competition with the Union Pacific-Central Pacific complex."

The Commission stated exactly the opposite in the 1966 report:

> "[T]he Pacific Railroad Acts clearly contemplated the addition of other railroads to the Overland route . . . ." (328 I.C.C. at 355)

**Conclusion**

The motions to affirm fail to establish that any of the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Accord-

ingly, the motions should be denied. Probable jurisdiction should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

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Dated: April 23, 1968

# SUPREME COURT OF THE UNITED STATES

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SOUTHERN PACIFIC CO. ET AL. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA.

No. 1159. Decided April 29, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.